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No. _____

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

DWAYNE ANTHONY DRURY,
Respondent.

On Petition For Writ of Certiorari To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
Assistant Attorney General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

87pgs

QUESTION PRESENTED

Whether displaying evidence of a crime to a suspect in police custody and informing the suspect that the evidence would be fingerprinted is the functional equivalent of interrogation under *Rhode Island v. Innis*, 446 U.S. 291 (1980).

PARTIES TO THE PROCEEDING

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Drury v. State*, 368 Md. 331, 793 A.2d 567 (2002), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-25a).

The unreported opinion of the Court of Special Appeals of Maryland, *Drury v. State*, No. 75, September Term, 1998, affirming the judgment of the Circuit Court for Queen Anne's County, Maryland, is reproduced in Appendix B. (App. 26a-43a).

The unreported proceedings and ruling of the Circuit Court for Queen Anne's County, *State v. Drury*, Criminal No. 4709, denying Drury's motion to suppress evidence, is reproduced in Appendix C. (App. 44a-54a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing Drury's convictions was filed on March 8, 2002. This petition is filed within 90 days of issuance of the opinion of the Court of Appeals of Maryland, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

While investigating a break-in at the Hillside Market in Centreville, Maryland, that occurred on July 14, 1996,

Corporal Mark Whaley of the Centreville Police Department determined that a tire iron possibly was used to pry open the rear door of the store. (App. 2a, 46a). The officer also learned that several "adult" magazines had been taken from the market, along with cartons of cigarettes, bottles of liquor, and lottery tickets. (App. 2a-3a, 46a). After finding a trash bag containing some discarded magazines and a malt liquor bottle, and doing further investigation, Whaley focused his attention on Respondent Dwayne Anthony Drury as a prime suspect. (App. 3a, 28a, 47a).

Officer Whaley went to Drury's home on July 15, 1996, and transported him to police headquarters to question him about the burglary. (App. 3a, 14a, 28a, 47a). Drury was not handcuffed at the police station. (App. 50a). Before beginning the interrogation, Whaley placed the tire iron found at the crime scene and the plastic trash bag containing adult magazines on his desk. (App. 4a, 49a). Whaley then told Drury that he was going to send the evidence off for fingerprinting. (App. 4a, 49a).

At that time, and before Whaley gave Drury his *Miranda*[1] warnings or began questioning him, Drury volunteered three pieces of information about the items before him. (App. 47a-49a). First, as the officer recounted, "Mr. Drury proceeded to tell me the contents of the bag prior to me even stating what was in the bag myself." (App. 47a). Second, Drury told Whaley "that he had touched the magazines that were in that bag," both the opened and unopened ones. (App. 47a-48a). Finally, with respect to the tire iron, Drury said "my fingerprints could

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

be on that and are on hundreds of tire irons around Centreville." (App. 47a).

Officer Whaley then advised Drury of his *Miranda* rights. Drury invoked his right to silence, which Officer Whaley honored. (App. 4a, 48a-49a). Drury was not arrested at that time, and was permitted to leave. (App. 24a). He was arrested eleven days later, after additional investigation. (App. 24a).

Based on the above facts, Drury was indicted by the Grand Jury for Queen Anne's County on charges of second degree burglary, fourth degree burglary, and theft over $300.00. (App. 2a). He filed a motion to suppress the oral statements he made to Officer Whaley, arguing that he had been interrogated in violation of his *Miranda* rights. (App. 2a). Based on the officer's uncontroverted testimony, the suppression court rejected Drury's argument that he had been interrogated in violation of *Miranda*. (App. 53a).

Following trial and conviction, Drury appealed to the Court of Special Appeals of Maryland. (App. 26a-27a). Maryland's intermediate appellate court affirmed Drury's convictions, rejecting his argument that the officer violated his *Miranda* rights. (App. 31a-40a).

On certiorari review, the Court of Appeals of Maryland reversed, finding the officer's actions to be the functional equivalent of interrogation and violative of *Miranda*. (App. 1a-13a). Focusing on Corporal Whaley's subjective intent, the majority stated: "The only plausible explanation for the officer's conduct is that he expected to elicit a statement from [Drury]." (App. 8a).

Judge Battaglia, joined by Judge Cathell, dissented. (App. 14a-25a). These two judges believed "the majority stretches the holding of *Innis*" to find that having a suspect

view physical evidence is tantamount to interrogation. (App. 25a). The dissent read the majority opinion to the effect that "being taken to the police station *itself* could be sufficient to trigger the administration of *Miranda* warnings," because it "creates an environment which is instantaneously infused with coercive and compelling elements for a suspect." (App. 17a). According to the dissent: "It is not improper to confront a suspect with the factual or physical evidence of his or her allegedly criminal act." (App. 23a).

REASONS FOR GRANTING THE WRIT

Review by this Court of the decision of the Court of Appeals of Maryland is warranted for several reasons. First, as a practical matter, the court below has created a per se rule that any time a police officer shows a suspect evidence of a crime the gears of *Miranda* are engaged. This is inconsistent with *Rhode Island v. Innis*, 446 U.S. 291 (1980), and other cases of this Court interpreting "compulsion" under *Miranda* and the Fifth Amendment. Brief police-citizen encounters, where the suspect is not subjected to compelling influences, psychological ploys, or direct questioning, should not be construed as "interrogation" under *Miranda*.

Second, because of some ambiguity in the *Innis* test and the paucity of subsequent decisions by this Court, several open questions in the wake of *Innis* need to be addressed. With this case, the Court can refine the contours of what constitutes compulsion under the Fifth Amendment by further explicating the "functional equivalent" definition of *Innis*.

Third, as illustrated by the present case and numerous

other decisions, the lower courts have reached conflicting results when faced with similar *Innis* claims. In cases involving the display of evidence to a suspect or the discussion of such evidence, the state and federal courts have interpreted *Innis* quite differently and have reached diametrically opposed results.

Finally, there are unfortunate public policy ramifications to the Maryland court's interpretation of *Innis*. Every day, hundreds if not thousands of times, police officers discuss or show evidence to suspects under a myriad of circumstances. Merely informing a suspect about the evidence against him, which is what occurred here, may contribute to the suspect's intelligent exercise of his judgment concerning his future actions. Under the opinion below, this option is no longer available to the suspect.

I. The Court's Decision Below Misapplies This Court's Decision in *Innis*.

When this Court decided *Miranda* in 1966, it ruled that the now familiar warnings must precede in-custody interrogation in order to safeguard the Fifth Amendment privilege against compelled self-incrimination. 384 U.S. at 444. In the aftermath of the decision, one issue involved what police conduct constitutes "interrogation." In one passage in *Miranda*, the Court suggested that interrogation referred only to actual "questioning initiated by law enforcement officers." *Id.* Fourteen years after *Miranda*, however, the Court construed "interrogation" more broadly than in the above-quoted passage.

In *Rhode Island v. Innis*, the Court was confronted with the following scenario. Five days after a Providence taxi

driver had been murdered by a shotgun blast to the back of his head, a second cab driver reported that he had been robbed by a man wielding a sawed-off shotgun. 446 U.S. at 293. At police headquarters, the robbery victim identified a photograph of Innis as the perpetrator. Within a few hours, the police arrested Innis on the street and advised him of his *Miranda* rights. *Id.* at 293-94. Innis invoked his *Miranda* right to counsel and the officers who were to accompany Innis to the police station were instructed not to interrogate him. *Id.* at 294.

Three officers drove in a police car with Innis to the police station. While en route, two of the officers began discussing the missing shotgun. One officer told the other that he frequented the area on patrol and that there was a school for handicapped children nearby. *Id.* He continued, "and God forbid one of them might find a weapon with shells and they might hurt themselves." *Id.* at 294-95. After hearing further discussion of the officers, Innis interrupted the conversation and told the police that he would inform them of the location of the gun. He led the officers to a nearby field and pointed out the location of the shotgun under some rocks by the side of the road. *Id.* at 295.

This Court examined what it meant by the term "interrogation" in *Miranda*. First, the Court determined that the term was broader than questioning initiated by law enforcement officers, as had been suggested in the *Miranda* opinion. *Id.* at 299. Rather, *Miranda* applies "whenever a person in custody is subjected to either express questioning or its functional equivalent." *Id.* at 300-01. The Court concluded that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of

the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301.

The Court reasoned that Innis was not "interrogated" within the meaning of *Miranda*. Innis was not expressly questioned by any of the officers. Nor was he subjected to the "functional equivalent" of questioning, as the officers should not "have known that their conversation was reasonably likely to elicit an incriminating response from [Innis]." *Id.* at 302. There was no evidence that the officers were aware that Innis was "peculiarly susceptible to an appeal to his conscience" or that he was "unusually disoriented or upset at the time of his arrest." *Id.* at 302-03.

The Court also found it important that the conversation was brief. "This is not a case where the police carried on a lengthy harangue in the presence of the suspect." *Id.* at 303. As the Court concluded: "It is our view, therefore, that [Innis] was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him." *Id.*

Finally, and of particular significance to the present case, the Court held that subtle compulsion did not constitute interrogation. *Id.* The Court acknowledged that it was "readily apparent" that the officers' conversation "struck a responsive chord" with Innis and that this subjected him to "subtle compulsion," but this did not establish that Innis had been subjected to the functional equivalent of interrogation. *Id.*

Seven years after *Innis*, the Court revisited the issue in *Arizona v. Mauro*, 481 U.S. 520 (1987). There, Mauro was arrested for his son's murder after freely admitting to

the crime and taking the police to the child's body. *Id.* at 521. After being taken to the police station and advised of his *Miranda* rights, Mauro told the officers that he did not wish to make any more statements without having a lawyer present. *Id.* at 522. At the same time, an officer was questioning Mauro's wife, who asked to speak with Mauro. *Id.*

The police permitted Mrs. Mauro to speak with her husband, but only in the presence of an officer. Not only did the officer listen to the conversation, he also placed a tape recorder in plain sight on a desk and recorded the conversation. *Id.* During the brief discussion, the wife expressed despair about the situation and the husband told Mrs. Mauro not to answer any questions until a lawyer was present. *Id.* The prosecution used the tape recording of the conversation to rebut Mauro's claim at trial that he was insane at the time of the crime. *Id.* at 523.

After reviewing its holding in *Innis*, the Court concluded that Mauro had not been interrogated by the police. First, the officer asked Mauro no questions about the crime or his conduct. *Id.* at 527. Nor was the officer's decision to allow Mauro's wife to see him "the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." *Id.* The Court held: "Mauro was not subjected to compelling influences, psychological ploys, or direct questioning. Thus, his volunteered statements cannot properly be considered the result of police interrogation." *Id.* at 529.

Taken together, *Innis* and *Mauro* stand for the proposition that brief police-suspect encounters, where no questioning takes place, generally will not be tantamount to interrogation. It is not enough that a particular encounter might be a form of subtle compulsion. Nor is it

sufficient that the suspect volunteers statements during such an encounter. Rather, the suspect must be subjected to a situation where he is reasonably likely to make an incriminating response, judged from the perspective of the suspect rather than the intent of the police. *Innis,* 446 U.S. at 301; *Mauro*, 481 U.S. at 526-27. *See also Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) ("the *Innis* test focuses primarily upon 'the perspective of the suspect'"); *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) ("Coercion is determined from the perspective of the suspect.").

Notwithstanding the clear import of the Court's reasoning in *Innis* (and without mention of *Mauro*), the Court of Appeals of Maryland concluded that Officer Whaley's presentation and discussion of evidence was the functional equivalent of interrogation. First, the state court acknowledged "that, although [Drury] was in custody, he was not subjected to express interrogation. The officer did not ask [him] questions, but rather made a statement to him and displayed the tire iron and magazines." (App. 8a).[2] The lower court found significant that Drury "had been brought to the police station for the express purpose of questioning." (App. 8a). In light of this, the court concluded: "The only plausible explanation for the officer's conduct is that he expected to elicit a statement from [Drury]." (App. 8a). Having determined that the police actions were "reasonably likely to evoke an incriminating response from him," (App. 8a), the court

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[2]The State of Maryland conceded below, and does not contest here, that Drury was in custody for *Miranda* purposes when Officer Whaley brought him to the stationhouse.

held that the absence of *Miranda* warnings required the suppression of Drury's statements. (App. 13a).

This conclusion appears to be inconsistent with *Innis* and *Mauro*: the encounter was brief and free from coercive indicia; Drury was not handcuffed; was not under arrest; and was not detained after making his remarks about the evidence he had seen. As in *Innis*, there was no evidence that the officer knew that Drury might be "peculiarly susceptible to an appeal to his conscience" or that he was "unusually disoriented or upset at the time" he was brought to the police station. 446 U.S. at 302-03. As in *Innis*, there was no "lengthy harangue." *Id.* at 303. Thus, even if Drury was subjected to some type of "subtle compulsion," it did not rise to the level of interrogation. *Id.*

II. With This Case, The Court Can Address Several Issues Left Open in the Wake of *Innis*.

Although *Innis* served as a starting point for this Court's analysis of what constitutes "interrogation" under *Miranda*, several questions remain open, even some 22 years later. As discussed below, at least three questions have arisen since *Innis* was decided. First, there has been some confusion as to how the *Innis* test itself is to be applied. Some lower courts, like the majority in this case, have tended to emphasize the subjective intent of the police officer in their *Innis* analyses, while other courts have viewed the test from the more objective perspective of the suspect. Second, it remains an open question whether the same analysis applies regardless of whether the suspect makes a statement before being given *Miranda* warnings or after invoking his *Miranda* rights. Finally, it

is not clear how to interpret this Court's reference in *Arizona v. Roberson*, 486 U.S. 675, 687 (1988), that informing a suspect about the facts of a second investigation does not necessarily constitute interrogation.

This Court stated in *Innis* that the definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." 446 U.S. at 301. The Court also noted, however, "[t]his is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id.* n.7. This somewhat ambiguous language has led to confusion in the lower courts.

The commentators have recognized the difficulty courts have had in applying the *Innis* test. One leading authority states: "As for what *Innis* does mean, this is a matter of some uncertainty. . . ." 2 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 6.7(a) at 544 (1999). LaFave also refers to another commentator's "alternative interpretation of *Innis* which more closely fits both the majority's result and its analysis," *id.*, namely:

> In order to preserve both the majority's objective approach and a close correlation between the officer's purpose and the "reasonably likely" standard, the best reading of the *Innis* test is that it turns upon the *objective* purpose *manifested* by the police.

Id., *quoting* Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *And* United States v. Henry, 78 Mich. L. Rev. 1209, 1231 (1980). LaFave believes the White reformulated test is consistent with the

result of *Innis*, is easy to apply, and is fully responsive to *Miranda* concerns. LaFave, *supra*, at 544-45.

Another commentator states: "*Innis*' 'reasonably likely to elicit' test is ambiguous on its face and is made even more confused by a result that the dissenters charged, with some reason, 'verges on the ludicrous.'" Jonathan L. Marks, *Confusing the Fifth Amendment with the Sixth: Lower Court Misapplication of the* Innis *Definition of Interrogation*, 87 Mich. L. Rev. 1073, 1084 (1989), *quoting Innis*, 446 U.S. at 306 (Marshall, J., dissenting). This article goes on to describe three interpretations of *Innis*: the "objective observer" test proposed by Professor White; the attempt of dissenting Justice Stevens to square the result in *Innis* with the articulated test; and an interpretation advanced by Professor Yale Kamisar "focusing on the compelling nature of the practice and not on the probability of its success." *Id.* at 1084-87.

Finally, a recent article extensively reviewed lower federal court decisions and found that the circuits have had extreme difficulty applying the *Innis* test. *See* Alexander S. Helderman, *Revisiting* Rhode Island v. Innis*: Offering a New Interpretation of the Interrogation Test*, 33 Creighton L. Rev. 729, 738-45 (2000). Finding little consistency, and noting that several circuits and states interpret the *Innis* test in more than one way, this commentator categorizes the decisions four ways: (1) an objective test;[3] (2) an objective test that also examines the

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[3]The author includes in this category decisions of the First, Seventh, and Tenth Circuits as well as cases from Maine, Nebraska, New Hampshire, Washington, and Wisconsin. *Id.* at 739 & nn. 78-80.

officer's intent;[4] (3) a subjective test focusing on the suspect's perspective;[5] and (4) a "mixed" test combining both an objective and subjective inquiry.[6] *Id.* at 738-39.

A second question remaining open after *Innis* is the matter of whether the same analysis applies to both first and second level *Miranda* protections. Stated otherwise, should the *Innis* definition of interrogation be the same when a suspect makes a statement prior to being given *Miranda* warnings (first level) and after a suspect has invoked his right to counsel or silence (second level)? In both *Innis* and *Mauro*, the suspects had been given *Miranda* warnings and had invoked their right to counsel. In the present case, by contrast, Drury was in police custody, but had not yet been given *Miranda* warnings when he was shown evidence of the burglary and made a statement. This case thus presents an opportunity for this Court to identify and explain any difference in analysis

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[4]In this category are cases from the Ninth, Tenth, Eleventh, and District of Columbia Circuits, and state decisions of Connecticut, Florida, Massachusetts, and North Carolina. *Id.* at 740-41 & nn. 87-90.

[5]Decisions are cited from the Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits, and from Alabama, California, Colorado, Illinois, Kentucky, Minnesota, Nevada, Ohio, and Vermont. *Id.* at 742 & nn. 96-100.

[6]Cases in this category are from the Third, Fifth, Sixth, and Ninth Circuits, and from the States of Arizona, Delaware, Maryland, Massachusetts, and Nevada. *Id.* at 743-44 & nn. 102-07.

between the two situations.[7]

A final issue yet to be addressed by this Court is the significance of the dicta concerning *Innis* in *Arizona v. Roberson*. In *Roberson*, the Court extended the rule of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), and held that in the context of the investigation of an unrelated crime, a suspect who has invoked his *Miranda* right to counsel cannot be forced to undergo police initiated interrogation. 486 U.S. at 687. The Court went on to discuss an argument made by the United States, as amicus curiae, that a suspect in custody might want "to learn from the police what the new investigation is about so that he can decide whether it is in his interest to make a statement about that matter without the assistance of counsel." *Id.* Citing *Innis*, Justice Stevens, writing for the Court, suggested that even if the police did not provide counsel as required under *Edwards*, the officers "are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation." *Id.*

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[7]Some commentators have argued that the analysis of such a first level protection should focus on whether the officer interrogated the suspect, whereas the issue under the second level should be whether the police "scrupulously honored" the invoked right. Marks, *supra*, 87 Mich. L. Rev. at 1114 & n. 255 (citing Kamisar's critique of failure to recognize distinction). As Marks states: "In *Mauro*, the Supreme Court blurred this distinction by finding that the police do scrupulously honor the rights of the suspect when they do not engage in interrogation." *Id.* at 1114.

This passage prompts two questions: (1) Under what circumstances will conveying information about an investigation rise to the level of interrogation?; and (2) What difference, if any, is there between telling a suspect in custody about the matter for which he is in custody as opposed to telling him about an unrelated matter? As to the first question, one reading of the *Roberson* language is that the mere conveyance of facts to the suspect would *not* be tantamount to interrogation, but how much more can police do before crossing the *Innis* line? This case presents the opportunity to answer these questions.

III. There is a Serious Conflict in the Rulings of Federal and State Courts Considering Similar *Innis* Claims.

The issue before the Court is a frequently recurring one. Many courts have addressed the *Innis* interrogation issue in cases similar to Drury's, where a suspect either was shown or was informed of evidence of a crime. Faced with either scenario, some courts have ruled that such physical or verbal displays are not the functional equivalent of interrogation. Others have come to the opposite conclusion.

In a case like the present one, an Arizona officer arrested a person on drug charges and took him to a nearby Motor Vehicle Department. *United States v. Blackstone*, 56 F.3d 1143, 1144 (9th Cir. 1995). Upon searching the arrestee's truck, the officer discovered a handgun and other evidence. The officer "packed his discoveries into a paper bag" and took Blackstone from the MVD to his own office. *Id.* Then, without reading Blackstone his *Miranda* rights, the officer began to empty the bag in front of the

handcuffed Blackstone. As soon as the officer removed the gun, Blackstone blurted out, "I was afraid you'd find that." *Id.* Relying upon *Innis*, the Court of Appeals for the Ninth Circuit came to a conclusion very different from the Court of Appeals of Maryland in this case, giving short shrift to Blackstone's argument that the officer's actions constituted "interrogation." *Id.* at 1146-47.

A Florida decision also illustrates a similar view that showing a suspect evidence of a crime is not tantamount to interrogation. In *Lewis v. State*, 509 So. 2d 1236 (Fla. App.), *review denied*, 519 So. 2d 987 (Fla. 1987), *cert. denied*, 486 U.S. 1036 (1988), a robbery suspect was shown a videotape of the robbery. While being shown the tape, Lewis said: "Man, he took it like a man. I should have hit him a couple more times." *Id.* at 1236. The Florida court, referencing *Innis* and *Mauro*, found that the statement was spontaneous and volunteered, not in response to interrogation. *Id.* at 1237.

Numerous federal courts have ruled on the "interrogation" issue when police officers have discussed evidence they have against a suspect, as opposed to showing the evidence to the suspect. Although not a visual display, this type of police conduct orally conveys the same information to a suspect in custody and has been challenged as the functional equivalent of interrogation.

United States v. Payne, 954 F.2d 199 (4th Cir.), *cert. denied,* 503 U.S. 988 (1992), typifies this line of cases. In *Payne*, the defendant was arrested after selling cocaine to an undercover FBI agent on two occasions. *Id.* at 200-01. While being transported from Hyattsville to Baltimore in the company of three FBI agents, one of the agents received information on a cell phone that a gun had been found at Payne's residence. *Id.* at 201. The agent then

said to Payne, "They found a gun at your house," to which Payne responded, "I just had it for my protection." *Id.* Payne moved to suppress his statement on *Innis* grounds. *Id.* In ruling that Payne was not "interrogated," the Fourth Circuit noted that there were "indications" from the Court in *Roberson* "that mere declaratory descriptions of incriminating evidence do not invariably constitute interrogation for *Miranda* purposes." *Id.* at 202.

Another case similar to Drury's is that of *Boykin v. Leapley*, 28 F.3d 788 (8th Cir. 1994). Boykin, having been strip-searched, complained to a deputy that the police had taken his shoes. *Id.* at 791. The deputy told Boykin that the police had probably taken the shoes "in order to make casts or to take pictures of the shoes in case they had a print at the crime scene matching his tennis shoes." *Id.* According to the deputy, Boykin "bowed his head a little bit and he said, 'Yeah, maybe they do.'" *Id.* Boykin argued "that the deputy's behavior amounted to a subtle form of police coercion that must be considered an interrogation." *Id.* at 792. The Eighth Circuit ruled that the circumstances of the conversation did not support the conclusion that Boykin considered himself under interrogation because he was not "subjected to compelling influences, psychological ploys, or direct questioning." *Id.* (quoting *Mauro*, 481 U.S. at 529).

In addition to *Payne* and *Boykin,* numerous other federal courts have spoken on this issue, and have concluded that telling a defendant about the evidence against him is not the functional equivalent of interrogation under *Innis*. *See, e.g., United States v. Allen*, 247 F.3d 741, 765-66 (8th Cir. 2001), *pet. for cert. filed* (U.S. Oct. 22, 2001) (No. 01-7310); *United States v. Taylor,* 985 F.2d 3, 6-8 (1st Cir.), *cert. denied*, 508 U.S.

944 (1993); *Shedelbower v. Estelle*, 885 F.2d 570, 571-73 (9th Cir. 1989), *cert. denied*, 498 U.S. 1092 (1991); *United States v. Guido*, 704 F.2d 675, 676-77 (2d Cir. 1983); *United States v. Bennett*, 626 F.2d 1309, 1310-13 (5th Cir. 1980), *cert. denied*, 449 U.S. 1092 (1981).

In direct opposition, other courts have ruled on similar facts that such police conduct *is* the functional equivalent of interrogation under *Innis*. In a case relied upon by the Maryland court below, a defendant was arrested for murder during the course of a robbery in which some furs were stolen. *People v. Ferro*, 472 N.E.2d 13 (N.Y. 1984), *cert. denied*, 472 U.S. 1007 (1985). Ferro was placed in a cell and the police positioned the stolen furs on the floor outside. *Id.* at 14-15. On these facts, the New York Court of Appeals found that placing the furs in the suspect's view was reasonably likely to elicit an incriminating response. *Id.* at 17.

Other courts have also ruled that showing evidence to a suspect or discussing such evidence of a crime is tantamount to interrogation. In one case, for example, officers placed several items on a table at the stationhouse within view of the suspect, who had been taken into custody on suspicion of murder. *State v. Nixon*, 599 A.2d 66, 66-67 (Me. 1991). One of the items was a sketch of the crime scene showing the position of the victim's body. After seeing Nixon "peering at the diagram," the detective pushed it towards him and said, "You might find this interesting." *Id.* at 67. The suspect then said, "I'll tell you one thing, he wasn't there, he was over there." *Id.* On these facts, the Supreme Judicial Court of Maine found the suspect had been interrogated. *Id.*

A case from Hawaii illustrates a similar view of *Innis*. While in custody on a burglary charge, Romeo Uganiza

told the cellblock turnkey that he did not wish to talk with the police. *State v. Uganiza*, 702 P.2d 1352, 1353 (Ha. 1985). Nonetheless, an officer came to the cell and showed Uganiza written statements of several witnesses and told him how the statements implicated him in the crime. *Id.* The arrestee then stated that he wished to explain what happened. *Id.* The Hawaii court ruled that the officer should have known that presenting this evidence was reasonably likely to elicit a response from Uganiza. *Id.* at 1355.

Other decisions are consistent with the above cases in holding that confronting a suspect with evidence of a crime is tantamount to interrogation. *See, e.g., Nelson v. Fulcomer*, 911 F.2d 928, 934 (3d Cir. 1990) (confronting suspect with alleged partner and informing him partner had confessed); *United States v. Walker*, 624 F. Supp. 103, 105 (D. Md. 1985) (showing incriminating document ten minutes after invoking *Miranda* rights); *Dancy v. United States*, 745 A.2d 259, 272-73 (D.C. 2000) (telling suspect in hospital about murder investigation and his involvement); *State v. Reeves,* 714 So. 2d 696, 696 (La. 1998) (handing arrest report, warrant, and affidavit listing evidence); *Commonwealth v. Rubio*, 540 N.E.2d 189, 193-94 (Mass. App.) (showing arrestee search warrant and cocaine seized), *review denied*, 545 N.E.2d 43 (Mass. 1989); *State v. Flack,* 860 P.2d 89, 91-93 (Mont. 1993) (five to ten minute discussion of evidence against suspect); *In re Interest of Durand*, 293 N.W.2d 383, 385-87 (Neb. 1980) (showing police reports to juvenile); *Weathers v. State*, 772 P.2d 1294, 1296-97 (Nev. 1989) (telling suspect he was under investigation and that witness had seen him near crime scene); *State v. Guayante*, 663 P.2d 784, 787 (Or. App.) (showing defendant food stamps stolen in

robbery and saying, "Look, we already know you did it. Here is the stuff you took from him."), *review denied*, 668 P.2d 384 (Or. 1983).

As the above cases illustrate, a major conflict exists in the lower courts, and this Court's guidance is needed. This Court should take this opportunity to resolve this conflict and delineate a clear line with respect to whether police "interrogate" suspects when they present or discuss evidence of the crime with a suspect in custody.

IV. Public Policy Concerns Require This Court to Reject the Maryland Court's Reading of *Innis*.

As this Court recently acknowledged: "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). In the same case, however, the Court noted a disadvantage of the rule, namely that statements that are "by no means involuntary" may be excluded nonetheless "and a guilty defendant go free as a result." *Id.* at 444. In this case, Drury should not go free, because neither the spirit nor the rationale of *Miranda* was violated.

The Court has made clear that police have leeway in determining how to deal with suspects and that some limited forms of "subtle compulsion" are permitted. *Innis*, 446 U.S. at 303. It is only when an officer takes advantage of a particularly susceptible person or subjects a person to extended, coercive treatment that the line is crossed. Only then might a course of action be tantamount to interrogation even though no questions are asked.

Here that line was not crossed. The brief encounter, free of coercive tactics, did not engage the gears of

Miranda. Yet the Maryland court found to the contrary. Holdings such as this one diminish the ability of law enforcement to use legitimate investigative tools. If suspects volunteer statements during such encounters, the statements should not be barred from courtroom use.

Moreover, permitting the police to share information freely with suspects works to the advantage of the person under suspicion. Both the Fourth and Ninth Circuits have noted that it may be in the interest of the suspect to be kept informed about the evidence against him. *See Payne*, 954 F.2d at 202; *United States v. Crisco*, 725 F.2d 1228, 1232 (9th Cir.), *cert. denied*, 466 U.S. 977 (1984). Giving a suspect notice of what evidence the police have in their possession provides the suspect with crucial information. Armed with that information, the suspect may make a more informed and intelligent decision on what course of conduct to follow. Perhaps the suspect will want to "stonewall" or, perhaps, to "come clean." In either event, knowledge about the police case can only be helpful to the suspect.

To serve these dual policies, which aid both the police and the suspect, *Innis* should not be construed to prevent the police from telling a suspect about evidence in their possession or showing it to him. The decision by the Court of Appeals of Maryland, and those in agreement with it, undermine both of these interests, and this Court should grant the petition to address this matter. By so doing, this Court can refine its decision in *Innis*, clarify the scope of interrogation under *Miranda*, and help draw a brighter line for officers and courts to follow.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
Assistant Attorney General

Counsel for Petitioner

**Counsel of Record*

June 3, 2002

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APPENDIX A

Court of Appeals of Maryland

No. 23, Sept. Term, 2001

DWAYNE ANTHONY DRURY

v.

STATE OF MARYLAND

March 8, 2002

Argued before BELL, C.J., ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL, and BATTAGLIA, JJ.

RAKER, Judge.

After Dwayne Anthony Drury, petitioner, was taken into police custody, but before he was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), a police officer showed him physical evidence and told him that the evidence would be processed for fingerprints. The question we must decide in this case is whether, under the circumstances presented herein, the statements that petitioner made prior to being advised of his *Miranda* rights must be suppressed because the officer conducted

the functional equivalent of interrogation. We shall answer that question in the affirmative and hold that the statements should have been suppressed.

I.

Petitioner was indicted by the Grand Jury for Queen Anne's County for the offenses of second degree burglary, fourth degree burglary, and theft over the value of $300.00. Prior to trial, he filed a motion to suppress the statements that he made to the police on the grounds that Corporal Mark Whaley of the Centreville Police Department in Queen Anne's County had interrogated him without informing him of his *Miranda* rights. Petitioner argued that the police officer's conduct was tantamount to interrogation under *Miranda* in that the officer should have known that placing evidence in front of petitioner, and telling him that it would be fingerprinted, was likely to elicit an incriminating response.

The Circuit Court held a hearing on the motion to suppress. The only witness to testify was Corporal Whaley. We recite the facts from the record of the suppression hearing.

On July, 14, 1996, Corporal Whaley went to the Hillside Market in response to a report of a break-in and theft at the market. The owner of the market told Corporal Whaley that he had found a tire iron behind the counter near the cash register. The officer looked around and saw that the rear door of the building had been pried open; it appeared to him that the tire iron had possibly been used to gain entry. Further investigation revealed that some property was missing, including several adult magazines, several cartons of cigarettes, bottles of liquor, and

numerous Maryland Instant Scratch-Off Lottery tickets.

Later that evening, a deputy sheriff told Corporal Whaley that he had seen two men acting suspiciously near an alleyway close to the market. Corporal Whaley went to that location, looked through the trash, and found several adult magazines and a liquor bottle. The officer interviewed Karl Kirby, a suspect in the case, who led him to petitioner. Corporal Whaley went to petitioner's home, brought him to the police station, and sat him down "within the department" for questioning. Before advising petitioner of his rights pursuant to *Miranda*, Corporal Whaley placed the tire iron and the trash bag containing the magazines on a desk in front of petitioner. Petitioner made some statements about the tire iron and the magazines. Corporal Whaley then advised petitioner of his *Miranda* rights, and petitioner made no further statements.

On direct examination, Corporal Whaley testified as follows:

> Q: After you talked with Mr. Kirby, did you go visit Mr. Drury?
>
> A: Yes. I picked Mr. Drury up for questioning, at which time I proceeded to show Mr. Drury the evidence which was retrieved. In showing Mr. Drury the tire iron that was retrieved from the actual incident area, Mr. Drury said, well, my fingerprints could be on that and are on hundreds of tire irons around Centreville, okay, and picking up the trash bag in which the magazines were located in, Mr. Drury proceeded to tell me the contents of the bag prior to me even stating what was in the bag

myself.

Q: What did he tell you?

A: He said that he had touched the magazines that were in that bag.

On cross-examination, the officer testified as follows:

Q: So you took the evidence out and put it in front of Mr. Drury?

A: I put it up on the desk in front of myself.

* * * *

Q: And did you tell Mr. Drury that you were going to send this evidence off for fingerprints?

A: As I recall, yes sir.

Q: You told him all that before you Mirandized him?

A: Yes sir.

Q: And that's when you claim that he made some statement about his fingerprints possibly being on these physical items?

A: Yes sir.

Q: And then once he was Mirandized, he didn't want to talk to you?

A: No sir

Petitioner argued that his statements were inadmissible because they were made in custody, in response to interrogation, and prior to his being advised of his *Miranda* rights. Concluding that the officer's conduct and statements would not prompt an answer from petitioner, the Circuit Court denied petitioner's motion to

suppress. Petitioner was convicted by a jury of all counts.[1] He noted a timely appeal to the Court of Special Appeals, and, in an unreported opinion, that court affirmed the judgment. We granted petitioner's writ of certiorari. *Drury v. State*, 364 Md. 134, 771 A.2d 1069 (2001).

II.

Petitioner argues before this Court that confronting a suspect in custody with physical evidence of a crime and telling him that the evidence will be processed for fingerprints is the functional equivalent of interrogation and that, in the absence of a valid *Miranda* waiver, any subsequent statements must be suppressed. The State concedes that petitioner was in custody.[2] The State argues that under the circumstances presented in this case, the officer's conduct was not the functional equivalent of interrogation and that *Miranda* warnings were therefore unnecessary.

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[1]Petitioner was sentenced to a term of imprisonment of five years on the second degree burglary and a term of imprisonment of five years on the theft charge, to be served consecutively, with all but six months suspended and five years probation commencing upon his release from incarceration. The court merged the fourth degree burglary charge for sentencing purposes.

[2] The record before us is devoid of any information shedding light on whether any warrant or charging document had been issued prior to the officer "[picking] up Mr. Drury for questioning."

III.

It is a basic principle that a statement taken during custodial interrogation conducted before a defendant is informed of his or her *Miranda* rights may not be used by the State in its case in chief against the defendant. The test to be applied in determining whether the police officer's statements and exhibition of the physical evidence was tantamount to interrogation is whether the words and actions of the officer were reasonably likely to elicit incriminating responses from petitioner. *See Williams v. State,* 342 Md. 724, 760, 679 A.2d 1106, 1124-25 (1996).

In *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), the Supreme Court considered whether Innis, the defendant, was subject to "interrogation," as the term was used in *Miranda*. *See Innis*, 446 U.S. at 298, 100 S. Ct. at 1688, 64 L. Ed. 2d 297. The Court concluded that the meaning of "interrogation" is not limited to express questioning; it also includes its "functional equivalent." *See id*. at 300, 100 S. Ct. at 1689, 64 L. Ed. 2d 297. The Court stated:

> "[T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses

> primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of the police officers that they *should have known* were reasonably likely to elicit an incriminating response."

Id. at 300, 100 S. Ct. at 1689-90, 64 L. Ed. 2d 297.

While the *Innis* inquiry focuses primarily upon the perception of the suspect rather than the intent of the police, the Court noted that the intent of the police is not irrelevant "for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response." *Id.* at 302 n.7, 100 S. Ct. at 1690 n.7, 64 L. Ed. 2d 297.

IV.

We turn now to the question of whether it can be fairly concluded that petitioner was subjected to the functional equivalent of interrogation. We find that the

officer's conduct and words were the functional equivalent of interrogation within the meaning of *Innis*.

It is undisputed that, although petitioner was in custody, he was not subjected to express interrogation. The officer did not ask petitioner questions, but rather made a statement to him and displayed the tire iron and magazines.

Petitioner had been brought to the police station for the express purpose of questioning and, in fact, had been told so by Corporal Whaley. The police were not engaged in routine booking procedures; they were not required by any Maryland rule or procedure to read any document (other than the *Miranda* rights) to petitioner. Nonetheless, the officer placed the tire iron and the trash bag containing the stolen magazines on the table before petitioner before advising him of his *Miranda* rights. The officer told petitioner that he was going to send the evidence to be examined for fingerprints. Moreover, the officer testified that he "was presenting the evidence that was going to be used for questioning."

It appears to us that the only reasonable conclusion that can be drawn from the foregoing facts is that the officer should have known, in light of his having told petitioner that he was being brought in for questioning, that putting the evidence before petitioner and telling him that the items were going to be fingerprinted was reasonably likely to evoke an incriminating response from him. The only plausible explanation for the officer's conduct is that he expected to elicit a statement from petitioner.

The Court of Appeals of New York reached the same conclusion in *People v. Ferro,* 63 N.Y.2d 316, 482 N.Y.S.2d 237, 472 N.E.2d 13 (1984). Ferro was arrested

for murder during the course of a robbery in which some furs were stolen. The police gave him his *Miranda* warnings, and he declined to answer any questions, but asked to speak to a District Attorney. Ferro was placed in a cell, and an officer placed the stolen furs on the floor outside of Ferro's cell. After telling the police officer that he still wished to speak to the District Attorney and would talk if the prosecutor could "do something for him," Ferro made some incriminating statements. The New York Court of Appeals held that Ferro was interrogated and that the officer should have known that placing the furs in front of his cell was reasonably likely to elicit an incriminating response from the defendant. *See id.* 482 N.Y.S.2d 237, 472 N.E.2d at 17. The court reasoned that "[w]here as here, . . . the only possible object of the police action in revealing evidence to a defendant is to elicit a statement from him, it does no violence to logic to conclude that the police should have known that it would do so." *Id.* (citations omitted).

The State relies on *Vines v. State*, 285 Md. 369, 402 A.2d 900 (1979), *State v. Conover*, 312 Md. 33, 537 A.2d 1167 (1988), and *Williams v. State*, 342 Md. 724, 679 A.2d 1106 (1996), to support its argument that petitioner was not subjected to police interrogation by Corporal Whaley. We find each of these cases distinguishable.

In *Vines*, the defendant was arrested in his home during the execution of a search warrant and then taken to the police station. *See Vines*, 285 Md. at 372, 402 A.2d at 901. The police advised Vines of his *Miranda* rights, and Vines invoked his right to remain silent. *See id.* He was then booked and taken to the roll call room where, displayed on the table, were drugs that the police had seized pursuant to the warrant. *See id.* at 369, 402 A.2d at

901-02. Vines was given a copy of the warrant, including the inventory of the seized property, and told that "this is what was recovered from his house during the raid." *Id.* at 373, 402 A.2d at 902. Vines then stated that "'it was his stuff'" and asked "'what he could do to help himself out.'" *Id.*[3]

We held that there was no interrogation in violation of *Miranda*. *See id.* at 378, 402 A.2d at 905. Vines was given the copy of the warrant and the inventory of the

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[3]Although the case predated *Innis*, this Court noted that nonverbal police conduct could be tantamount to interrogation for *Miranda* purposes. *See Vines*, 285 Md. 369, 376, 402 A.2d 900, 903-04 (1979). We did not, however, have the benefit of the *Innis* language reasoning that interrogation "refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297 (1980). We noted that whether police conduct was tantamount to interrogation depends upon the facts and circumstances of the particular case, and that the cases throughout the country presented a wide variety of fact patterns and judicial attitudes, presenting no clear pattern that we were persuaded to follow. *See Vines*, 285 Md. at 376, 402 A.2d at 904. The same is virtually true today.

Because we fine [sic] *Vines* distinguishable, it matters not that the qualifying language of *Innis* was not a consideration.

property taken from his home pursuant to the Maryland Rules, which "provided that an officer taking property under a search warrant shall make a written inventory of the property taken in the presence of the person from whom the property is taken if such person is present at the time the warrant was executed." *Id.* at 377, 402 A.2d at 904. Moreover, the officer's statements did not stray from the ambit of the Maryland Rules; he "merely made the true statement that this was what was recovered from Vines' house during the raid." *Id.* at 378, 402 A.2d at 904. Giving the inventory to Vines in compliance with the rules, together with the simple factual statement linking the contraband to the inventory, was not tantamount to interrogation within the meaning of *Miranda. See id.* at 377, 402 A.2d at 904-05.

In sharp contrast, petitioner was not being processed, the police were not serving a warrant or inventory upon him pursuant to a Maryland rule, and they did not merely place the tire iron and stolen magazines before him. The officer told petitioner that they were going to process the items for fingerprints. Considering that the officer brought petitioner to the station for the specific purpose of questioning him, it hardly strains logic to conclude that the officer should have known that his conduct and words would elicit an incriminating response.

Neither *Conover* nor *Williams* add any weight to the State's argument. In *Conover*, as in *Vines*, the defendant was arrested and invoked his *Miranda* rights. *See Conover*, 312 Md. at 37, 537 A.2d 1169. The police, in compliance with the Maryland Rules, read and gave to him a copy of the Statement of Charges, including the application for the statement of charges, suggesting that he read them and ask any questions that he had. *See id.* at 42,

537 A.2d at 1171. Conover then made a self-incriminating statement. Following our earlier decision in *Vines* – that routine processing of an arrested defendant does not amount to interrogation under Miranda – we found "no sinister motive [in] the fact that the police provided [Conover] with a copy of the Application as well as a copy of the Statement of Charges." *Id.* As noted above, in the case before us, there was no analogous official basis or procedural rule requiring Corporal Whaley to act as he did. The only reasonable explanation for his conduct is that he intended to elicit a statement from petitioner.

Williams is also distinguishable. Williams was arrested and, in response to his inquiry as to why he was arrested, was informed that he was under arrest for a double murder. *See Williams*, 342 Md. at 758, 679 A.2d at 1124. One of the officers showed him a photograph purportedly of Williams using one of the victims' ATM cards. *See id.* Williams stated that "that's me." *Id.* Williams was then given his *Miranda* rights, at which point he invoked his right to remain silent and requested an attorney. *See id.* When the officers began to gather their papers, one of them told Williams to remove his earring, and Williams mumbled, "you can't get me. I'll just say a girl gave me the card." *Id.* One of the officers commented that "this is going to work" and again told Williams that he was being charged with two murders. *Id.* Williams then said "I am never going to get out." *Id.*

The trial court suppressed the first statement, but not the second or third. This Court agreed, holding that the second and third statements were not the result of interrogation because the words and actions of the police following the *Miranda* warnings were not reasonably likely to elicit an incrimination response. We noted that

the officers, in gathering their papers and telling Williams to remove his earring, were engaged in "routine procedures that the officers could hardly be expected to anticipate would prompt an incriminating statement." *Id.* at 760-61, 679 A.2d at 1125. Like *Vines* and *Conover, Williams* is easily distinguished from the case before us on the basis that the police conduct in this case was not routine police procedure nor "innocuous comment." Corporal Whaley's actions were aimed at invoking an incriminating remark.

As demonstrated above, the facts in this case suggest that petitioner was subject to custodial interrogation prior to being advised of his *Miranda* rights. Corporal Whaley had reason to know that his conduct was reasonably likely to elicit an incriminating response; indeed, there is no explanation for his conduct but that he expected to elicit such statements. In stark contrast to the cases relied on by the State, this is not a case where a suspect incriminated himself while police officers merely conducted routine arrest procedures. Accordingly, we hold that the trial court should have suppressed the statements that petitioner made before he was given his *Miranda* warnings.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY AND REMAND THE CASE TO THE CIRCUIT COURT FOR A NEW TRIAL. COSTS IN THIS COURT AND THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT.

CATHELL and BATTAGLIA, JJ., dissent.

Battaglia J., dissenting.

I respectfully dissent.

At approximately 5:40 a.m. on July 14, 1996, Corporal Whaley of the Centreville Police Department responded to a call reporting a breaking and entering and theft at the Hillside Market in Centreville, Maryland. During the course of his investigation, Corporal Whaley found a tire iron, which had been used to break into the store. The investigation also revealed that the suspects had stolen $1,370.00 worth of instant scratch off lottery tickets, $299.00 worth of adult magazines, $800.00 worth of cartons of cigarettes, and $104.92 worth of alcoholic beverages. A later search of refuse by Corporal Whaley revealed a trash bag containing several adult magazines and one empty malt liquor bottle.

Thereafter, on July 15th, Corporal Whaley went to the place of employment of Mr. Carl Kirby to speak with him about the incident. Kirby revealed that the petitioner, Dwayne Drury, and another individual, David Reinecke, committed the Hillside Market theft.

Later that same day after talking with Kirby, Corporal Whaley went to Drury's residence from whence he and Drury traveled to the Centreville Police Department to discuss the matter. Drury and Corporal Whaley were in the Corporal's office at the police station when the following occurred, as recounted by Corporal Whaley:

> Whaley: I was stating, I placed the evidence up on my desk, which I was going to be presenting to Mr. Drury, and while presenting it, I was explaining

to him the process that was going to be taking place, as far as when I showed him the tire iron, I advised him I [sic] it would be sent off for – to lift possible latent prints as far as the individuals that were the perpetrators, at which time Mr. Drury made the statement to me that his prints could possibly – were probably on that tire iron because there are hundreds of tire irons around Centreville.

State: Did you show him anything else?

Whaley: When I was picking the bag up to show it to him, he made the statement that he advised me [of] the contents of the bag, and he made the statement that he had already touched it.

State: By the bag, you mean the trash bag you found in the alley way?

Whaley: That's correct.

State: What did he say?

Whaley: He stated that the magazines were in it. He did not mention the malt liquor bottle.

State: Was that before you showed him the contents?

Whaley: That's correct.

State: What did he say?

Whaley: He said he knew what was in the bag. He basically told me the magazines were in the bag, that he

had touched them.

State: And that's pretty much the end of your discussion with Mr. Drury?

Whaley: That's correct. He chose to exercise his right not to talk to me.

Drury was released, without arrest.

After further investigation, Drury was arrested on July 26, 1996, and charged with burglary in the second degree pursuant to Maryland Code (1957, 1996 Repl. Vol.) Art. 27, Section 30(a), burglary in the fourth degree pursuant to Maryland Code (1957, 1996 Repl. Vol.) Art. 27, Section 32(a)(2) and (c), theft pursuant to Maryland Code (1957, 1996 Repl. Vol.) Art. 27, Section 342, malicious destruction of property pursuant to Maryland Code, (1957, 1996 Repl. Vol.) Art. 27, Section 111, and common law conspiracy.

Prior to trial, petitioner moved to suppress the statements he made to Corporal Whaley upon his arrival at the police station on the grounds that he had not been given his *Miranda* warnings. The thrust of his argument was that Corporal Whaley had intended to elicit an incriminating statement when he placed the evidence on his desk and informed Drury that it would be processed for fingerprints. The trial court denied the motion to suppress, stating:

> Just saying he was going to do it, he got the evidence bag and he said he put it down on the desk or table in front of him, meaning the officer, you asked him specifically that, and he, your client then, according to the officer, just made these statements. In some ways they weren't even apropos of anything that was said, he said he was going to send

them off. Just doesn't seem to me that that is something that would prompt an answer.

Petitioner argues, and the majority agrees, that the trial court improperly denied his motion to suppress because by confronting Drury with the physical evidence of his crime and informing him that the evidence would be processed for fingerprints, Corporal Whaley engaged in the functional equivalent of an interrogation in violation of Drury's Fifth Amendment privilege against self-incrimination. I do not agree. The situation presented does not differ significantly from the scenario that arises when a suspect is in custody and is expressly questioned while being "booked," when *Miranda* warnings are not required.

From the majority's perspective, being brought by police officers to, and crossing the threshold of, the police station creates an environment which is instantaneously infused with coercive and compelling elements for a suspect. In their view, being taken to the police station *itself* could be sufficient to trigger the administration of *Miranda* warnings. In contrast, however, in *Pennsylvania v. Muniz*, 496 U.S. 582, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990), in which the drunken driver was in custody at the police station, the Supreme Court recognized that there is a distinction between questions or situations involving coercion designed to elicit information for investigatory purposes and requiring administration of *Miranda* warnings, and communication between police officers and suspects, such as pre-*Miranda* booking questions. In *Muniz*, a plurality of the Court determined that the *Miranda* warnings are not required before "routine" booking questions are asked. *See* 496 U.S. at 601, 110 S. Ct. at 2650, 110 L. Ed. 2d at 552.

This Court in *Hughes v. State*, 346 Md. 80, 695 A.2d 132, *cert. denied*, 522 U.S. 989, 118 S. Ct. 459, 139 L. Ed. 2d 393 (1997), recognized that not all questions proffered to a suspect during the booking process are so immunized and suggested that careful scrutiny of the factual setting of each encounter was required. *Id.* at 94-95, 695 A.2d at 139 (explaining that for the booking question exception to apply, "the questions must be directed toward securing simple identification information of the most basic sort")(quoting *United States ex rel. Hines v. LaValle*, 521 F.2d 1109, 1113 & n.2 (2nd Cir. 1975), *cert. denied sub. nom., Hines v. Bombard*, 423 U.S. 1090, 96 S. Ct. 884, 47 L. Ed. 2d 101 (1976))(internal quotations omitted).

In the present case, Drury was not confronted with a situation in which he was questioned at all or asked for a response to which he would have to decide among truthfulness, falsity or silence – the "trilemma" discussed in *Muniz*. 496 U.S. at 596-97, 110 S.Ct. at 2647-48, 110 L.Ed. 2d at 549. Rather, he blurted out an explanation about his fingerprints and the trash bag, which he intended to be exculpatory and explanatory.

Furthermore, Corporal Whaley posed no question to Drury, which would call for an answer or expression of an opinion; the officer simply informed Drury that the evidence would be sent off for fingerprinting. *See United States v. Allen*, 247 F.3d 741, 765 (8th Cir. 2001), *petition for cert. filed*, (U.S. Oct. 22, 2001)(No. 01-7310)("Informing a suspect that he has been identified in a lineup contributes to the intelligent exercise of his judgment and may likely make firm his resolve to refuse to talk to the police without counsel."); *United States v. Payne*, 954 F.2d 199, 203 (4th Cir. 1992), *cert. denied*, 503

U.S. 988, 112 S. Ct. 1680, 118 L. Ed. 2d 396 (1992)(agent's statement to defendant which did not seek or require a response was not an interrogation); *United States v. Jackson*, 863 F.2d 1168, 1172 (4th Cir. 1989)(DEA agent's statement which was in the form of a declaration, not a question, was not the functional equivalent of an interrogation where defendant responded to hearing the agent's declaration by making a false exculpatory statement which was used against him at trial); *United States v. Comosona*, 848 F.2d 1110, 1112-13 (10th Cir. 1988)(agent's act of giving defendant his business card and inviting defendant to call him if he wanted to talk to him about the incident after defendant had invoked his right to counsel was not an impermissible interrogation as contemplated by the Supreme Court's decisions in *Miranda* and *Innis*); *Virgin Islands v. Kidd*, 79 F. Supp. 2d 566, 574 (D.V.I. 1999)(finding no interrogation took place where a defendant confessed to committing the crime after one of the police officers initiated a conversation with the defendant about his family); *Weber v. State*, 326 Ark. 546, 933 S.W.2d 370, 373 (1996)(finding no interrogation where the defendant made an inculpatory statement prior to arrest upon being greeted by the police officer); *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377, 384-85 (1981)(where a radio exchange between two officers inquiring of one another as to whether the bank bag had been recovered prompted defendant to inform the officers that "the bank bag is in the car" followed by the officer clarifying by asking, "What bank bag?" and defendant's statement, "The bag from the robbery" was found not to be the product of an interrogation).

While it is clear from the facts of this case that

petitioner was not subjected to an express interrogation by Corporal Whaley prior to being informed of his *Miranda* rights, such as in the booking situation, Drury, nevertheless, argues that he was subjected to the "functional equivalent of an interrogation" as explicated in the United States Supreme Court's decision in *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689, 64 L. Ed. 2d 297, 307-08 (1980). That is not the case here, however.

The Court in *Innis* set forth the following explanation of what constitutes an interrogation as contemplated by the *Miranda* decision:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should

> know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

446 U.S. at 300-02, 100 S. Ct. at 1689-90, 64 L. Ed. 2d at 307-08. (emphasis in original).

The Fourth Circuit Court of Appeals noted that "the *Innis* definition of interrogation is not so broad as to capture within *Miranda*'s reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges." *Payne*, 954 F.2d at 202; *see Tucker v. Warden*, 175 F. Supp. 2d 999, 1002-03 (S.D. Ohio 2001)(stating that "to determine whether a suspect has been 'interrogated,' the heart of the inquiry focuses on police coercion, and whether the suspect has been compelled to speak by that coercion")(quoting *State v. Tucker*, 81 Ohio St.3d 431, 692 N.E.2d 171, 175 (1998)); *Kirby v. Senkowski*, 141 F. Supp. 2d 383, 395 (S.D.N.Y. 2001)(stating that for statements to be suppressed as a violation of the Fifth Amendment privilege against self-incrimination, "the statements must be the result of compulsion"); *United States v. Castorena-Jaime*, 117 F. Supp. 2d 1161, 1170 (D. Kan. 2000)(". . . absent a showing of coercion or other misconduct by law enforcement, an arrestee's volunteered statements made before receiving the *Miranda* warning may be used against

him.")

Ascertaining whether a particular situation involved an interrogation or the functional equivalent of an interrogation depends on the facts and circumstances of each case, "particularly whether the statements are objectively and reasonably likely to result in incriminating responses by the suspect, as well as the nature of the police statements and the context in which they are given." *Allen*, 247 F.3d at 765. While it is true that a direct question need not be posed to a criminal defendant in order to constitute the functional equivalent of an interrogation, *see Innis*, 446 U.S. at 301, 100 S. Ct. at 1689-91, 64 L. Ed. 2d at 308, I believe that Corporal Whaley's direct factual statement that the items would be processed for fingerprinting does not rise to the level of coercion or compulsion contemplated in *Innis* as being the functional equivalent of an interrogation. As the Fourth Circuit Court of Appeals explained in *Payne*:

> That no comment on the evidence in a case will ever issue in the presence of a criminal suspect seems to us neither realistic nor desirable as an absolute rule derived from the Fifth Amendment. Indeed, it may even be in the interest of a defendant to be kept informed about matters relating to the charges against him.
>
> * * *
>
> We thus reject [Payne's] argument that statements by law enforcement officials to a suspect regarding the nature of the evidence against the suspect constitute interrogation as a matter of law. It simply cannot be said that all such statements are objectively

> likely to result in incriminating responses by those in custody. The inquiry mandated by *Innis* into the perceptions of the suspect is necessarily contextual . . . and whether descriptions of incriminating evidence constitute the functional equivalent of interrogation will depend on circumstances that are too numerous to catalogue. As a result, substantial deference on the question of what constitutes interrogation must be paid to the trial courts, who can best evaluate the circumstances in which such statements are made and detect their coercive aspects.

954 F.2d at 202-03. The same result occurred in *Williams v. State*, 342 Md. 724, 760-61, 679 A.2d. 1106, 1125 (1996) when this Court did not suppress an incriminatory statement made by a defendant in custody in a police station after police advised him that they had evidence establishing his guilt, although the defendant had invoked his right to an attorney and one was not present.

Although one could opine that Corporal Whaley was being deceptive in his placement of the evidence on the desk in front of Drury simultaneously with his declaration that the items would be processed for fingerprints, that opinion is not enough of a basis to require suppression of Drury's statement. It is not improper to confront a suspect with the factual or physical evidence of his or her allegedly criminal act. Numerous federal and state jurisdictions have rejected what Drury asserts when they have considered a wide range of factual scenarios which involved confronting a suspect with physical evidence of the crime or a verbal recitation to the

suspect of the evidence against him. *See Allen*, 247 F.3d at 764-65 (holding that informing the suspect that three out of four eyewitnesses placed him at the scene of the crime was "a simple description of the status of the ongoing investigation" and not the functional equivalent of an interrogation for purposes of the Fifth Amendment); *Payne*, 954 F.2d at 203 (holding that agent's statement to defendant during post-arrest transport by the FBI informing defendant that agents had found a gun in his home after which defendant made an inculpatory remark was not an interrogation); *Lewis v. State*, 509 So.2d 1236 (Fla. App. 4th Dist. 1987), *cert. denied*, 486 U.S. 1036, 108 S. Ct. 2025, 100 L. Ed. 2d 612, (1988)(trial court did not err in failing to suppress defendant's statement, "Man, he took it like a man. I should have hit him a couple more times," which defendant made while police were showing him a videotape of the robbery because the act of showing the tape was not the functional equivalent of an interrogation); *State v. McLean*, 294 N.C. 623, 242 S.E.2d 814, 818 (1978)(finding that by displaying the suspect's belongings found at the scene of the crime to the suspect while he was in custody, but had not been given the *Miranda* warnings, the officer did not engage in conduct which was "inquisitional in nature," thus the suspect's statements were not the product of an interrogation).

It is also important to note that Drury was not arrested on July 15, 1996, after he gave his explanation. He was arrested on July 26, 1996, after additional investigation.

Thus, my analysis reveals that Drury's pre-*Miranda* custodial statements concerning the physical evidence of his crime were the product of his own free will and consciousness, rather than the result of an interrogation.

I believe the majority stretches the holding of *Innis* to conclude that under the circumstances present in this case, of having the defendant view physical evidence of the crime and of having a police officer state that the evidence will be processed for fingerprints, is tantamount to an interrogation. I agree with the Circuit Court's decision to deny Drury's motion to suppress his unwarned statement, for I find no Fifth Amendment violation. Accordingly, I would affirm the decision of the Court of Special Appeals.

Judge CATHELL has authorized me to state that he joins in this dissent.

APPENDIX B

Unreported

Court of Special Appeals of Maryland

No. 75, Sept. Term, 1998

DWAYNE ANTHONY DRURY

v.

STATE OF MARYLAND

January 23, 2001

Submitted before MURPHY, C.J., EYLER, JAMES R., and KRAUSER, JJ.

KRAUSER, Judge.

Dwayne Anthony Drury, appellant, was charged with second degree burglary and related offenses. Prior to trial, appellant moved to suppress statements he had made to police. That motion was denied. Thereafter, he was convicted by a jury in the Circuit Court for Queen Anne's County of second degree burglary, fourth degree burglary and theft over $300. Following that trial, he was

sentenced to a term of incarceration and ordered to pay restitution. This appeal followed.

Appellant presents two questions on appeal:

I. Did the trial court err in denying his motion to suppress?

II. Was the evidence sufficient to sustain his convictions?

BACKGROUND

Motion to Suppress

Corporal Marc Whaley of the Centreville Police Department was the only witness called to testify by either party at the hearing on appellant's motion to suppress. Corporal Whaley testified that he had investigated a break-in and theft at the Hillside Market in the early morning hours of July 14, 1996.

Upon arriving at the market, he spoke to an employee of the market who informed him that he had found a tire iron behind the counter near the cash register. Corporal Whaley learned that adult magazines, some of which were still wrapped in plastic, cartons of cigarettes, bottles of liquor and Maryland Instant Scratch-Off lottery tickets were missing and had been apparently taken during the burglary.

Later that evening, a deputy sheriff informed Corporal Whaley that he had observed two men on the corner of Commerce and Water Streets in the early morning hours of July 14th, acting in a suspicious manner. That street corner was not far from the market. The next morning, Corporal Whaley went to an alley at that

location, and looked through the trash. Opening one of the trash bags, Corporal Whaley found several adult magazines, some of which were still wrapped in plastic, and a liquor bottle.

As a result of his investigation, Corporal Whaley went to appellant's home and transported him to the police station to question him about the burglary. Before advising appellant of his *Miranda*[1] rights, Corporal Whaley placed the tire iron and the trash bag on the desk. According to Corporal Whaley, he was "presenting the evidence that was going to be used for the questioning." When Corporal Whaley informed appellant that he was going to send the items to be fingerprinted, appellant stated that his fingerprints could be on the tire iron, and that his fingerprints were on "hundreds of tire irons around Centreville." Corporal Whaley then picked up the trash bag; whereupon, appellant stated that he had touched the magazines inside the bag. Corporal Whaley advised appellant of his *Miranda* rights, and appellant did not say anything further.

At the conclusion of the hearing, appellant argued that Corporal Whaley intended to elicit an incriminating response when he showed him the bag and the tire iron and told him that they would be processed for fingerprints. The trial judge disagreed. He stated:

> Just saying he was going to do it, he got the evidence bag and he said he put it down on the desk or table in front of him, meaning the officer, you asked him specifically that,

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[1] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

> and he, your client then, according to the officer, just made these statements. In some ways they weren't even apropos of anything that was said, he said he was going to send them off. Just doesn't seem to me that that is something that would prompt an answer.

Accordingly, the trial court denied appellant's motion.

Trial

John Chenaud was the owner of the Hillside Market in Centreville. On July 14, 1996, Chenaud opened the market at approximately 5:00 a.m. and went inside. When he went behind the counter, he found a tire iron. He noticed that lottery tickets, adult magazines, cartons of cigarettes and liquor were missing. He observed that the back door of the market had been pried open. Chenaud telephoned the police. According to Chenaud, the value of the items taken was $2,835.94.

Deputy First Class George Sewell of the Queen Anne's County Sheriff's Department was driving his patrol car when, sometime between midnight and 2:00 a.m. on July 14, 1998, he stopped at a red light at the corner of Water and Commerce Streets. He looked to his right and saw an individual he knew named David Renke. Mr. Renke was looking at the entrance of an alley. Deputy Sewell observed appellant run out of the alley and stop when he got to Renke. Both men then began walking toward Water Street. The deputy waved to Renke, but Renke did not wave back. The location was approximately one-quarter to one-half mile from the

Hillside Market.

At the time of the incident, Karl Kirby lived with Renke in an apartment at the corner of Commerce and Water Streets. Kirby returned home from work during the early morning hours of July 14, 1996, and found Renke and appellant in the apartment. The three shared a bottle of Kings Cobra malt liquor. Kirby found cigarettes, lottery tickets and "girlie magazies [sic]" in the apartment. According to Kirby, appellant told him that he had gotten the magazines, cigarettes and scratch off lottery tickets "at Hillside." Appellant further informed Mr. Kirby that he had entered Hillside through an unlocked back door. Kirby then told appellant and Renke to take the lottery tickets out of his apartment.

Later that day, Corporal Whaley told Deputy Sewell about the break-in. Deputy Sewell recounted seeing Renke and appellant, and told Corporal Whaley that he might want to check the alley. At approximately 3:00 a.m. on July 15th, Corporal Whaley went to the alley and looked through the trash bags. In one of the trash bags he found "several adult magazines" and an empty bottle of King Cobra malt liquor.

Corporal Whaley knew that Kirby and Renke lived in an apartment above the alley. Later that morning, the corporal went to Kirby's place of employment and took him to the police station for questioning. After obtaining a written statement from Kirby, Corporal Whaley went to appellant's home and took him to the police station for questioning. At the police station, appellant made the statements that were the subject of the motion to suppress.

After speaking with appellant, Corporal Whaley again spoke to Kirby. Kirby consented to a search of his

apartment. He told Corporal Whaley the location of one carton of Newport cigarettes. He also told Corporal Whaley that magazines could be found stuck into an old arm chair which had its underside ripped open.

At trial, Chenaud examined a group of magazines marked collectively as Exhibit 3. He stated that his wife had made a list of the missing items. He testified that those magazines were the same type that he sold in his store. He further stated that magazines included in the exhibit "matched up" with the missing magazines on the list that his wife had made. He conceded, however, that "it's possible that what was taken may not be in that pile."

DISCUSSION

I

Appellant contends that the trial court erred in denying his motion to suppress the statements he made to Corporal Whaley. He argues that the statements in question should have been suppressed because they were made as a result of a custodial interrogation and obtained before *Miranda* warnings had been given. While not disputing that appellant was in custody at the time he made the statements in question, the State responds that the statements were admissible because they were made before an interrogation had commenced.

In considering the denial of a motion to suppress, the record at the suppression hearing is the exclusive source of facts for our review. *Lee v. State*, 311 Md. 642, 648 (1988); *Trusty v. State*, 308 Md. 658, 670 (1987); *Aiken v. State*, 101 Md. App. 557, 563 (1994). We extend

great deference to the first-level fact-finding of the suppression court and accept the facts as found, unless clearly erroneous. *Riddick v. State*, 319 Md. 180, 183 (1990); *Perkins v. State*, 83 Md. App. 341, 346-47 (1990). Moreover, we give due regard to the suppression court's opportunity to assess the credibility of the witnesses. *McMillian v. State*, 325 Md. 272, 281-82 (1992). Further, we review the evidence in the light most favorable to the State as the prevailing party. *McMillian*, 325 Md. at 281; *Riddick*, 319 Md. at 183.

While we accept the findings of disputed fact unless clearly erroneous, after having given due regard to the lower court's opportunity to assess the credibility of witnesses, we make our own constitutional appraisal as to the effect of those facts. *Ornelas v. United States*, 517 U.S. 690, 696-97 (1996); *McMillian*, 325 Md. at 285.

In a criminal case, when the prosecution introduces an extrajudicial confession or admission given by the defendant to the authorities, the basic rule is that it must, upon proper challenge, establish by a preponderance of the evidence that the statement was obtained (1) in conformance with the dictates of *Miranda* and (2) voluntarily. *See Lodowski v. State*, 307 Md. 233, 250 (1986).

In *Miranda*, the United States Supreme Court held that "in the context of 'custodial interrogation' certain procedural safeguards are necessary to protect a defendant's Fifth and Fourteenth Amendment privilege against compulsory incrimination." *Rhode Island v. Innis*, 446 U.S. 291 (1980). Accordingly, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant

unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 479. "Those safeguards include the now familiar *Miranda* warnings. *Innis*, 446 U.S. at 297.

In *Innis*, the United States Supreme Court defined the term "interrogation" as used in the *Miranda* decision. It concluded that,

> the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U. S. at 300-01. The Court further stated that whether any words or conduct on the part of the police are likely to elicit an incriminating response is to be viewed from the perspective of the suspect, rather than from the intent of the police. *Id.* at 301. The intent of the police is relevant, but only to the extent that it reflects on whether or not their words or conduct is reasonably likely to elicit an incriminating response. *Id.* at 301, n 7.

In *Innis*, after a murder suspect had been arrested and informed of his *Miranda* rights, he requested an attorney. According to the dictates of *Miranda* and of *Edwards v. Arizona*, 451 U.S. 477 (1981), the police were required to stop interrogating the suspect until he either

had counsel present or reinitiated communication with the police. While transporting the suspect from the scene of his arrest to the police station, the officers discussed among themselves the possibility that children attending a nearby school for handicapped children would find the loaded gun and injure themselves. The suspect overheard the conversation and told the officers that he would show them the location of the gun. He directed the officers to a field near the scene of his arrest and pointed out the location of the gun.

Innis subsequently sought to suppress the gun and his statements regarding it, alleging that he had been "interrogated" in violation of his right to remain silent. Although a majority of the Rhode Island Supreme Court agreed that Innis had been subjected to "'subtle coercion' that was the equivalent of 'interrogation'" *Innis*, 446 U.S. at 296, the United States Supreme Court did not. The Court explained:

> The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few off hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention

> that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

446 U.S. at 303.

The United States Supreme Court again considered the scope of "custodial interrogation" in *Arizona v. Mauro*, 481 U.S. 520 (1987). There, a defendant who had been arrested for killing his son invoked his right to counsel. The police stopped questioning the defendant and placed him in the office of the police captain. The defendant's wife asked to be allowed to speak with her husband. The officers told both defendant and his wife that they could talk to each other, but only if an officer were present in the room to observe and hear what was going on. The officer brought the defendant's wife into the room, seated himself at a desk and placed a tape recorder in plain view. He taped the conversation. Mauro sought to suppress the recording, arguing that it was a product of police interrogation. The trial court rejected that argument. The Arizona Supreme Court reversed, noting that the officers had acknowledged in pretrial hearings that they knew it was "possible" that Mauro would make an incriminating statement.

The United States Supreme Court held that Mauro's statements were not the result of police interrogation. It noted that no questions were asked about the crime, nor was the decision to allow the meeting the "kind of psychological ploy that properly could be treated as the

functional equivalent of interrogation." *Id.* at 527.

The Court further explained:

> Mauro was not subjected to compelling influences, psychological ploys, or direct questioning. Thus, his volunteered statements cannot properly be considered the result of police interrogation.
>
> In deciding whether particular police conduct is interrogation, we must remember the purpose behind our decisions in *Miranda* and *Edwards*: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.

481 U.S. at 529-30. *See also State v. Conover*, 312 Md. 33, 41-42 (1988).

The Maryland Court of Appeals considered whether a display of evidence constituted interrogation in *Vines v. State*, 285 Md. 369 (1979). In *Vines*, a suspect who had invoked his right to counsel was taken to the roll call room at police headquarters. Some of the contraband seized pursuant to a search warrant was displayed on a table in the room. The suspect was given a copy of the warrant containing the inventory of property seized pursuant to the warrant and told that that was what was recovered from his house during the raid. "Thereupon, he looked at the display on the table for a couple of seconds, sat down on a chair and 'made an [incriminating]' outburst." *Id.* at 373.

The Court of Appeals concluded that Vines had not been interrogated. Noting that the officers gave Vines a

copy of the warrant pursuant to the Maryland Rules, the Court stated,

> We fail to see how, in the circumstances, a confrontation with some of the physical evidence listed in the inventory changed the conduct of the police to an "interrogation."

Id. at 378.

Although, as both appellant and appellee note, *Vines* was decided before *Innis*, we do not believe that *Innis* would compel a different result.

In *State v. Conover*, 312 Md. 33 (1988), the defendant was given *Miranda* warnings after his arrest. He stated that he understood his rights and that he wanted to have an attorney. The detectives resumed processing the defendant. One of the detectives read him the Statement of Charges and handed him the Statement along with the Application. He suggested that the defendant "read them, look at them, if you have any questions ask them." *Id.* at 37. The defendant asked hypothetical questions, but also stated, "you can't put me with that .38." *Id.* at 37. The Court of Appeals held that the detectives had not interrogated the defendant within the meaning of *Miranda*. The Court noted that the officers were required to give the defendant a copy of the Charging Document. It inferred no "sinister motive" from the fact that the defendant was also given a copy of the Statement of Charges. *Id.* at 42.

In *Williams v. State*, 342 Md. 724 (1996), the defendant had invoked his right to remain silent and indicated that he wanted an attorney. The investigating officers then gathered their papers and one of the officers told Williams to remove his earring. Williams mumbled,

"you can't get me. I'll just say a girl gave me the card." *Id.* at 759. After that statement, one of the detectives "commented that '[t]his is going to work' and reiterated to Williams that he was being charged [with a double murder]." *Id.* at 759. At that point, Williams said, "I know I'm never getting out." 342 Md. at 759. Williams moved to suppress the statements, but his motion was denied. The Court of Appeals saw no error in the trial court's finding that those comments were not reasonably likely to elicit an incriminating response.[2] The Court noted the comment of the Fourth Circuit Court of Appeals in *United States v. Payne*, 954 F.2d 199, 202 (4th Cir. 1992), that, "the *Innis* definition of interrogation is not so broad as to capture within *Miranda*'s reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges." *Williams* at 761.

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[2] In *Williams*, prior to being given *Miranda* warnings, the defendant had asked the detectives why he was being detained. The detectives told him that he was under arrest for a double murder. One of the detectives showed Williams a photograph portraying Williams using the ATM card of one of the victims. Williams stated, "[y]eah, that's me." 342 Md. at 759. The trial court suppressed this statement because Williams had not been given *Miranda* warnings. The Court of Appeals noted that "[t]he question of whether the trial judge was correct in suppressing Williams's first statement to the police, made before the *Miranda* warning, is not before us on this appeal." *Id.* at 760, n. 11.

Other courts have held that confronting a suspect with the evidence against him is not "the functional equivalent of interrogation." In *United States v. Payne*, *supra*, for example, an FBI agent traveling with Payne received a cellular telephone call during a car ride from Hyattsville to Baltimore. Afterward, the agent told Payne, "They found a gun at your house." 954 F.2d at 201. Payne responded, "I just had it for my protection." *Id.* at 201. The Fourth Circuit Court of Appeals held that the agent's statement to Payne did not constitute interrogation. It noted the pronouncement of the United States Supreme Court in *Arizona v. Roberson*, 486 U.S. 675, 687 (1988) that "[the police] are free to inform the suspect of the facts of the second investigation as long as such communication does not constitute interrogation," extrapolating therefrom that "mere declaratory descriptions of incriminating evidence do not invariably constitute interrogation for *Miranda* purposes." *Payne*, 954 F.2d at 202. *See also Shedelbower v. Estelle*, 885 F.2d 590 (9th Cir. 1983) (telling suspect that his accomplice had been arrested and that the victim had identified his photograph did not constitute interrogation); *Lewis v. Florida*, 509 So. 2d 1236 (Fla. App. 1987) (showing video of robbery to suspect did not constitute interrogation). *But see*, *e.g.*, *United States v. Walker*, 624 F. Supp. 103 (D. Md. 1985) (showing an espionage suspect who had invoked his right to counsel incriminating documents constituted interrogation).

In the present case, we do not believe that Corporal Whaley's statement that he was going to have the tire iron and bag fingerprinted was the functional equivalent of

interrogation.[3] The comment was brief and was made shortly after appellant was taken to police headquarters. We do not read the comment as being particularly "evocative." *See Innis*, 446 U.S. at 303. Appellant was not subjected to compelling influences, psychological ploys or direct questioning. *See Mauro*, 481 U.S. at 529. We do not believe that the statement was reasonably likely to elicit an incriminating response from appellant. Accordingly, the trial court did not err in denying appellant's motion to suppress.

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[3] In the present case, unlike *Innis* and the other cases cited, appellant had not yet been "Mirandized" when he made the statements that are the subject of this appeal. In *United States v. Taylor*, 985 F.2d 3, 7, n. 4 (1st Cir. 1993), the Court stated:

> Although the basic test for custodial "interrogation" does not differ in the pre-Miranda context, courts should be particularly alert to the presence of subtle declarations and conduct by the police, such as those challenged in *Innis*, because an unwarned defendant may be less alert to her rights or to the risks of "volunteered or spontaneous" admissions.

Nonetheless, this does not change our analysis of the facts presented here.

II

At the end of the State's case, appellant moved for a judgment of acquittal. The basis of that motion was that Kirby was "a possible un-indicted co-defendant" whose testimony was uncorroborated. He further argued that there was nothing other than Kirby's testimony that appellant admitted breaking into the market that supported the burglary count and theft and that the evidence was insufficient for that reason.

In this appeal, appellant repeats his contention that the evidence was insufficient to sustain his convictions. He states that "[a] conviction resting on circumstantial evidence alone, however, cannot be sustained on proof amounting only to strong suspicion or mere probability." He contends that Kirby's testimony and statement to Corporal Whaley are "far too suspect to support a finding of guilt beyond a reasonable doubt." In support of that argument, appellant points out that Kirby initially testified at trial that he did not talk to appellant about the break-in. He further argues that Kirby testified that he was a friend of Whaley's and that Kirby wrote the statement after being told he could be charged as an accessory.

The State first contends that the question is not preserved for our review. It states that the only ground given for the motion by the defense at trial was that Kirby's testimony required corroboration; therefore, appellant's present contention - that Kirby's testimony was not credible - is unpreserved.

In a criminal action, where a jury is the trier of fact, appellate review of a claim of sufficiency of the evidence is available only where the defendant moves for judgment

of acquittal at the close of all the evidence and argues precisely the ways in which the evidence is lacking. Md. Rule 4-324(a); *Fraidin v. State*, 85 Md. App. 231, 244-45 (1991). A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal in challenging the denial of a motion for judgment of acquittal. *Bates v. State*, 127 Md. App. 678, 691 (1999). *See also Graham v. State*, 325 Md. at 417. In the present case, however, we believe that appellant's argument in the trial court included the assertion that Kirby's testimony was not credible. Accordingly we will consider the merits of appellant's complaint.

The standard for our review of the sufficiency of the evidence is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (1979); *Bloodsworth v. State*, 307 Md. 164, 167 (1986). Weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks proper for the fact finder. *Bryant v. State*, 49 Md. App. 272, 283-84 (1981).

Although Kirby did, at first, deny that he had talked to appellant and Renke about the items taken from the Hillside Market, after viewing his statement of July 15th, he testified that his memory was refreshed. He then testified that when he arrived home, he saw "girlie magazines," cigarettes, and lotto tickets. He further testified that he did not recall many of the events of that morning, but that the statement accurately reflected his knowledge at the time it was made. The jury was apprised

that appellant and Renke were Kirby's friends. The jury was also apprised that Kirby had been friends with Corporal Whaley and that Corporal Whaley told Kirby that he could be charged as an accessory in the burglary. The jury was, nonetheless, entitled to believe Kirby's testimony and it obviously did. The evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that appellant was the individual who burglarized the Hillside Market and stole the missing items.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

APPENDIX C

Unreported proceedings and ruling of November 26, 1996 in the Circuit Court for Queen Anne's County, Maryland, The Honorable John W. Sause, Jr., *State of Maryland v. Dwayne Anthony Drury*, Criminal No. 4709.

* * * * * * *

MR. GREGORY: Good afternoon, Your Honor.

THE COURT: Mr. Richardson.

MR. GREGORY: State of Maryland versus Dwayne Anthony Drury, 4709. This is a motion to suppress, and this is probably one of those omnibus things, and what is it that is relevant at this time, sir?

MR. RICHARDSON: Your Honor, I filed a motion to suppress, and it said physical evidence, but, when I received the State's answer to discovery, I realized there were some statements, as well, which I would like to address.

THE COURT: I don't think Mr. Gregory has any objection.

MR. GREGORY: I just would like for the defendant to admit that he has standing at least for the physical --

THE COURT: What?

MR. GREGORY: That he has standing to object to the physical evidence.

THE COURT: Does he have standing?

MR. RICHARDSON: Your Honor, I believe looking through the file, the apartment that the physical evidence was taken from was at 100 East Water Street and that wasn't my client's rented or leased apartment, so, I

don't believe that there would be standing under the law actually, on further investigation.

THE COURT: All right. Mr. Drury, you understand that, don't you?

THE DEFENDANT: Yes, sir.

THE COURT: I mean, for instance, if somebody came in and illegally searched my house, you wouldn't have any right to complain about that, that would be my complaint, not yours; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions?

THE DEFENDANT: No, sir.

THE COURT: Let's go ahead with the statements. You may have a seat.

MR. GREGORY: I'd call Officer Whaley.

CORPORAL MARC E. WHALEY,

being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. GREGORY:

Q. Officer Whaley, please state your name and duty assignment.

A. Corporal Marc Whaley, Centreville Police Department, Queen Anne's County, Maryland.

Q. I draw your attention to July the 15th and ask if you -- of this year, I'm sorry, and ask if you had occasion on that date to begin the investigation of the break-in and theft at the Hillside Market located in Centreville?

A. It was on the 14th, sir.

Q. I'm sorry, the 14th. What if anything did you do in furtherance of that investigation?

A. I responded to Hillside Market with reference to a burglary report. Met with the complainant who advised

me that upon his opening the establishment he found a tire iron behind the counter near the cash register near the main counter. Further investigation revealed that several adult magazines had been taken, several cartons of cigarettes had been taken, bottles of liquor were missing, and numerous Maryland Instant Scratch-Off tickets were missing.

Q. As a result of receiving that information, what if anything did you do?

A. Began to search for a possible area where the individuals gained entry, at which time the rear door of the building was found to have been pried open and it appeared the tire iron was possibly used to gain that entry.

Q. Did you begin a look-out for a possible culprit in this matter?

A. I'm sorry, I didn't hear you.

Q. Did you do anything further, look for any possible culprits?

A. Yes, sir, later on that evening I had the opportunity to speak with Deputy George Sewell at the Queen Anne's County Sheriff's Department. In explaining the case I was working on Deputy Sewell proceeded to advise me two individuals that he saw on the corner of Commerce and Water Street acting in a suspicious manner. I took that information that Deputy Sewell had given me and three o'clock in the morning on the 15th I did a trash rip of some trash to be disposed of in the alleyway, where Deputy Sewell stated that he observed these two suspicious individuals.

Q. What do you mean by that, you went through the trash cans in the alleyway where Deputy Sewell saw these folks?

A. Yes, sir.

Q. What did you find?

A. Upon opening one of the trash bags I found several adult magazines, some of which had been opened, some of which had the plastic wrap intact, and a King Cobra Malt Liquor bottle.

Q. With that information what did you do?

A. I knew one individual that lived in the apartment, who leased the apartment, at which time I confronted him, took him to Centreville Police Department for questioning, at which time that individual, it was Carl Franklin Kirby, proceeded to give me a written statement stating that he knew the two individuals that had broken into the Hillside Market and identified the merchandise that was taken, and stated that the merchandise was in his apartment earlier, on the 14th, and that portions of it had been disposed of and he did not know the whereabouts of the remaining.

Q. After you talked with Mr. Kirby, did you go visit Mr. Drury?

A. Yes. I picked Mr. Drury up for questioning, at which time I proceeded to show Mr. Drury the evidence which was retrieved. In showing Mr. Drury the tire iron that was retrieved from the actual incident area, Mr. Drury said, well, my fingerprints could be on that and are on hundreds of tire irons around Centreville, okay, and picking up the trash bag in which the magazines were located in, Mr. Drury proceeded to tell me the contents of the bag prior to me even stating what was in the bag myself.

Q. What did he tell you?

A. He said that he had touched the magazines that were in that bag.

Q. Both the opened and the unopened magazines?

A. Yes, sir.

Q. By unopened you mean, so we're all on the same wavelength, the girlie magazines with the plastic wrapper around them?

A. Yes, sir.

Q. Did he say anything else to you?

A. No, sir. Not at that point.

Q. How about at any other point?

A. Not that I recall at the moment.

MR. GREGORY: That's all the questions I have of Officer Whaley.

CROSS-EXAMINATION

BY MR. RICHARDSON:

Q. Corporal Whaley, you said you questioned Mr. Drury on July 15th?

A. Mr. Drury wasn't actually questioned.

Q. What did you do with Mr. Drury? Did you speak to him?

A. I brought Mr. Drury in for questioning, and upon --

Q. Okay. Hold it. You took Mr. Drury and took him to the Centreville Police Department?

A. That's correct.

Q. Okay. So you didn't question him on the street or at the apartment?

A. No, sir.

Q. And you brought him into the Centreville Police Department and where did you talk to him then?

A. Within the department.

Q. Within the department. And did you Mirandize Mr. Drury?

A. Yes, I did.

Q. Okay. Did he give any statements after being

Mirandized?

A. No, he did not.

Q. These statements you say that he made, what did you do before he made any statements? What actions did you take with this physical evidence?

A. I was presenting the evidence that was going to be used for the questioning.

Q. So you took the evidence out and put it in front of Mr. Drury?

A. I put it up on the desk in front of myself.

Q. We're talking about the tire iron you put in front of him?

A. Yes, sir.

Q. And the magazines in the bag, the physical evidence from this robbery?

A. Yes, sir.

Q. And did you tell Mr. Drury that you were going to send this evidence off for fingerprints?

A. As I recall, yes, sir.

Q. You told him all that before you Mirandized him?

A. Yes, sir.

Q. And that's when you claim that he made some statement about his fingerprints possibly being on these physical items?

A. Yes, sir.

Q. And then once he was Mirandized, he didn't want to talk to you?

A. No, sir.

Q. Was anyone else there besides you and Mr. Drury?

A. No, sir.

Q. Do you know how old Mr. Drury was?

A. He was 18 or older. I've had acquaintance with Mr. Drury before.

Q. You -- you don't know his exact age?

A. No, sir, not presently, I don't.

MR. RICHARDSON: I don't have any other questions, Your Honor.

MR. GREGORY: Just if I might, Your Honor.

REDIRECT EXAMINATION

BY MR. GREGORY:

Q. Your responses, I take it, to Mr. Richardson's questions, are that Mr. Drury made these statements to you prior to you asking him any questions; is that right?

A. Yes, sir.

MR. GREGORY: That's all the questions I have.

THE COURT: And you didn't address any questions to him at all at that point?

THE WITNESS: No, I didn't.

THE COURT: Thank you -- was he handcuffed or --

THE WITNESS: No, sir

THE COURT: Thank you.

MR. GREGORY: That's all the witnesses I have.

MR. RICHARDSON: Basically I would like to make a motion to suppress those statements. I think it falls under a scenario similar to the Brewer v. Williams case, the Supreme Court case, where interrogation refers not only to suppressed questioning but also to any words or actions that the police know or should know are likely to elicit an incriminating response from a suspect.

Now, we have Corporal Whaley bringing Mr. Drury into his police department, not questioning him at his home, bringing him into the police department, and

Corporal Whaley takes out this physical evidence and says he is going to send it off for fingerprints, and he does this all before his Miranda warnings are given. Now, he does that with the intention of eliciting some kind of response from Mr. Drury, a young man.

THE COURT: He didn't state he had that intention.

MR. RICHARDSON: That's the inference I draw and I think it falls under the Brewer case and under the facts of this it should be suppressed because the intention was to get a reaction. He didn't Mirandize him, he could have easily done that, said these are your rights and I'm going to show you some physical evidence, instead of brings him in there and dumps the evidence on the table and looks for a response, before any Miranda warnings are given, his intentions are to circumvent Miranda.

THE COURT: Suppose he had said to him, I think I'm going to send out and get myself a hamburger. He didn't have to say anything. He didn't -- there's no indication that he said it in a threatening manner. Just saying he was going to do it, he got the evidence bag and he said he put it down on the desk or table in front of him, meaning the officer, you asked him specifically that, and he, your client then, according to the officer, just made these statements. In some ways they weren't even apropos of anything that was said, he said he was going to send them off. Just doesn't seem to me that that is something that would prompt an answer.

MR. RICHARDSON: Well, Your Honor, I think it's analogous to where an officer says I can get a warrant but if you don't want me to get a warrant, let me search now. When you start telling him, he is in a police department, and you tell him I'm going to send these off for fingerprints, do you want to make any statement before

I Mirandize you, that's what the intentions are.

THE COURT: He didn't say he asked him if he wanted to make any statements before he Mirandized him, did he?

MR. RICHARDSON: My argument is he is putting the evidence here and saying I'm going to get the fingerprints off the stuff and dumping the evidence on the table. Brewer says not just suppressing but any actions the police know or should know are likely to elicit --

THE COURT: I thought the officer also testified that the defendant was there at the time he recovered the stuff, did I misunderstand you?

THE WITNESS: I'm sorry, Your Honor.

THE COURT: That the defendant was there at the time when he recovered the stuff?

THE WITNESS: When I went into the apartment to retrieve the goods, he was there, yes, sir.

MR. RICHARDSON: But the questioning wasn't done there, the questioning was done after bringing him back to the department, putting him in custody.

THE COURT: All right, thank you. Mr. Gregory.

MR. GREGORY: Your Honor, if it please the court, all Officer Whaley did was put these items on the table and before he could begin his questioning apparently the defendant decided to make some statements, the statements were, I guess I agree with the court about some of the appropriateness, one is I have touched a lot of tire irons around Centreville, that's kind of an interesting statement, and the other one is before apparently Officer Whaley could talk about the bag the defendant starts telling him what's in the bag. The officer hadn't gotten to the point, I suggest, to the court and to Mr. Richardson, where even the interrogation had begun yet. When he

finally got to that point he Mirandized Mr. Drury and said the defendant elected not to make any statements or answer any questions.

THE COURT: Well, indeed, the statements were not necessarily inculpatory, the statements were simply that he had touched the items.

MR. GREGORY: Or could have.

THE COURT: Could have. Well, I would assume that anybody in this courtroom could have, if they had been in the business establishment from whence they came. But I don't -- I don't know that the statements in and of themselves -- there are several ways that you can view this testimony, the statements of the defendant, it seems to me. One is that he was suggesting that -- well, he said you might find my fingerprints on those items, what's known as building bridges in front of you, I suspect. But it was an election he made himself. I don't know the officer --

MR. GREGORY: That --

THE COURT: I'm going to deny the motion. That the case be set for trial.

MR. RICHARDSON: Yes, Your Honor.

THE COURT: When is it?

MR. RICHARDSON: I believe it's January 17th.

THE COURT: All right. So, we're all set then. Anything else we can do for government order today?

MR. GREGORY: No, sir, not in this case.

THE COURT: Are you off this afternoon?

THE WITNESS: I'm working midnight.

THE COURT: Suppose I order you to stay home tonight, do you think your chief would --

THE WITNESS: I'd greatly appreciate it. I'm feeling good now, thank you.

THE COURT: Well, you take care. My secretary had something like that yesterday. She fortunately went home and just got sicker, but Ms. Peters was sick yesterday, and at the end of the day she bounded around better than ever. Because she took care of herself. You do so too. Thank you.

(Witness excused.)

(Proceedings adjourned.)

Supreme Court, U.S.
FILED
JUL 3 2002
OFFICE OF THE CLERK

No. 01-1774

In The Supreme Court Of The United States

STATE OF MARYLAND,
Petitioner,

v.

DWAYNE ANTHONY DRURY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF OHIO AND 18 OTHER STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY*
State Solicitor
**Counsel of Record*
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

Counsel for *Amici* States

BILL PRYOR
Attorney General
State of Alabama

BRUCE M. BOTELHO
Attorney General
State of Alaska

KEN SALAZAR
Attorney General
State of Colorado

M. JANE BRADY
Attorney General
State of Delaware

STEVE CARTER
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

CARLA J. STOVALL
Attorney General
State of Kansas

RICHARD P. IEYOUB
Attorney General
State of Louisiana

MICHAEL C. MOORE
Attorney General
State of Mississippi

MIKE MCGRATH
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

PATRICIA A. MADRID
Attorney General
State of New Mexico

W. A. DREW EDMONDSON
Attorney General
State of Oklahoma

D. MICHAEL FISHER
Attorney General
Commonwealth of
Pennsylvania

MARK BARNETT
Attorney General
State of South Dakota

JOHN CORNYN
Attorney General
State of Texas

MARK L. SHURTLEFF
Attorney General
State of Utah

DARRELL V. MCGRAW, JR.
Attorney General
State of West Virginia

QUESTION PRESENTED

Whether *Miranda* warnings must be given to a suspect in police custody before police may show evidence to the suspect and tell the suspect that the evidence will be examined for fingerprints.

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STATEMENT OF *AMICI* INTEREST

The State of Ohio and 18 other amici States urge the Court to grant Maryland's petition. Law enforcement officers in every State strive earnestly to respect the constitutional rights of criminal suspects, even as those officers gather information that will solve crimes and convict the guilty. And while all agree that certain warnings must be given by the police before a suspect's statement made during custodial interrogation can be admitted in evidence – a constitutional principle that "has become embedded in routine police practice to the point where the warnings have become part of our national culture," *Dickerson v. United States*, 530 U.S. 428, 443 (2000) – this Court's guidance is needed now on the particular question that Maryland raises here.

Before the law enforcement officer in this case asked any questions of respondent Drury – who had not received the *Miranda* warnings and who was admittedly in custody for questioning in connection with his suspected role in a recent burglary – the officer simply placed some evidence in front of Drury. That act alone, coupled with the officer's statement that the evidence would be sent away for examination by a fingerprint expert, prompted Drury to offer incriminating statements. Though the officer then promptly recited the *Miranda* warnings to respondent Drury, the court below held that his pre-*Miranda* statements were the product of custodial "interrogation." The state trial court's admission of those statements was reversible error, according to the court of appeals.

State and federal courts are now divided on whether that broad reading of the term "interrogation" is appropriate. In the wake of those decisions, state and local law enforcement officers are left to wonder whether they must provide *Miranda* warnings before actual questioning begins,

or whether instead they must give those warnings at some earlier point before the officers do anything in the suspect's presence. The States seek clear direction from the Court in this area of the law, for law enforcement officers frequently confront the very situation that the officer did in this case.

REASONS FOR GRANTING THE WRIT

I. The Judgment Below Is Not Consistent With *Miranda* Or With The Constitutional Principles That Underlie That Decision.

No one doubts that *Miranda* warnings must be given once police questioning is about to begin, but when criminal suspects make voluntary statements before then, the rationale underlying *Miranda* should not compel exclusion of those statements. The ruling below over-protects criminal suspects before police questioning begins, and reads too much into the term "interrogation." While the States are free to impose extra *Miranda*-warnings requirements on law enforcement officers in cases like this, nothing in the Constitution compels them to do so.

In this case, the respondent suspect made key self-incriminating statements about a recent burglary, and he did so before the police had asked him any questions. Yet those pre-*Miranda* statements were inadmissible at trial, according to the court of appeals, because the respondent offered those statements after seeing some of the evidence and after learning that the police intended to send the evidence to a fingerprint examiner. That decision undoing a state criminal conviction goes beyond any requirement imposed on the government by *Miranda v. Arizona*, 384 U.S. 436 (1966), or by the Fifth Amendment, and the decision warrants review in this Court now.

A. Showing Evidence To A Suspect Does Not Raise The Same Concerns About Coercion That Police Questioning Does.

As *Miranda* and later cases have found, "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *Dickerson*, 530 U.S. at 435. It is of course that coercive process that warrants the reading of the constitutionally-mandated *Miranda* warnings for each suspect before custodial interrogation begins. But the approach of the court of appeals shifts the *Miranda* warnings obligation ever-earlier to a point before the time when the concerns underlying *Miranda* come into play. All agree in this case that true police questioning had not begun when respondent Drury saw the evidence and offered his incriminating statements, and nothing about the situation that Drury faced compelled him to do or say anything in response to the pre-interrogation actions of the police.

As the dissenting judges on the court of appeals explained, the kind of police action that occurred in this case will never subject a suspect to the consequences that flow once a police officer actually poses a question to a suspect. When faced with such a question, the suspect must (1) answer truthfully with information that may incriminate him, or (2) answer falsely, thereby perhaps giving the police statements that will be admitted against him at trial and proven untrue through the testimony of other witnesses, or (3) defy the officer by remaining silent.

The *Miranda* warnings aim to protect criminal suspects from that "cruel trilemma of self-accusation, perjury or contempt" that "defined the operation of the Star Chamber." *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (quotations omitted). But just as a voluntary pre-*Miranda*-warnings statement was admissible in *Muniz*, where the suspect offered that incriminating statement in response to

police instructions about field sobriety tests, so respondent Drury's statement was properly admitted at *his* trial, where he volunteered that statement at the mere sight of the evidence in police custody. Drury never faced the truth-falsity-silence predicament that true interrogation imposes on suspects in police custody.

To be sure, this Court has said that words or actions on the part of the police that are "reasonably likely to evoke an incriminating response from a suspect" amount to interrogation under *Miranda*. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). But just as the police activity in that case amounted to "nothing more than a dialogue between the two officers to which no response from the respondent was invited," and so could not be described as interrogation or the "'functional equivalent' of questioning," 446 U.S. at 302, so too the actions of the officer in this case – physically laying out some evidence and telling the respondent that it would be sent off for a fingerprint examination – did not call for a response from him.

B. The Risk Of False Confessions, While Perhaps Significant When Officers Pose Leading Questions, Is Slight In Cases Like This.

Though some commentators have expressed appropriate concern in recent years about false confessions – a problem that arguably "threaten[s] the quality of criminal justice in America," Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 493 (1998) – a false confession seems very unlikely when a suspect is simply shown some evidence, as happened in this case. In much the same way that excited utterances are not excluded by the hearsay rule under Fed. R. Evid. 803 – presumably

because the excited speaker's statement is viewed as particularly genuine and trustworthy – courts can likewise presume that few suspects will give a false confession at the mere sight of evidence from the crime scene.

Professor Amar has argued that exclusion of unreliable evidence is the Fifth Amendment's focus: The "rationale of the Self-Incrimination Clause [is] best read [as] reliability. Compelled testimony may be partly or wholly misleading and unreliable; even an innocent person may say seemingly inculpatory things under pressure and suspicion and when flustered by trained inquisitors." Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 900-01 (1995). The States – committed as we are to maintaining judicial systems that protect the constitutional rights of the innocent and the guilty alike – certainly embrace Amar's view of the Fifth Amendment. But to the extent that *Miranda* warnings protect even innocent suspects from their own tendencies to falsely incriminate themselves during the course of sometimes-grueling police interrogations, the link between those warnings and legitimate concerns about false confessions seems particularly weak in cases like this one, where the suspect made his incriminating remarks before the officer had asked any questions at all.

In fact, of course, seeing the evidence before questioning began gave respondent Drury valuable insight into the case against him. With that information in mind, he could consider how to respond effectively once police questioning began, and could avoid the trap that less-informed suspects might walk into before realizing that some valuable piece of physical evidence was already in police custody.

C. The States Are Entitled To Protect Suspects In The Way That The Ruling Below Has Done, But The Fifth Amendment Does Not Compel That Result.

Just as some States and a number of commentators have concluded that virtually every police interrogation should be videotaped, so we understand the view of some who argue that *Miranda* warnings ought to be given at the first available opportunity in every case. But of course the question presented by Maryland is whether the *Constitution* compelled the officer in this case to give those warnings to the respondent before showing the evidence to him. We States remain free to give greater protections to criminal suspects and defendants if we choose, but absent a pre-questioning *Miranda*-warnings requirement in the Fifth Amendment, and absent state constitutional or statutory requirements that compel the reading of *Miranda* warnings well before police questioning begins, local law enforcement officers should be free to engage in the kind of reasonable conduct that the officer in this case pursued.

The States and local law enforcement officers work hard to consistently balance effective crime-solving and truth-seeking techniques with the individual constitutional rights that we all value. As Maryland's petition explains, law enforcement officers are now uncertain about the timing of their obligation to read the *Miranda* warnings to suspects. While the particularly careful officer may very well, in an abundance of caution, opt to recite the warnings early and often whenever a suspect is within earshot – and while some States may even choose, through their own statutes or constitutions, to require officers to do exactly that – no one benefits from the current uncertainty over the timing of law enforcement officers' *federal constitutional* obligations in situations like the one that this officer faced.

This case presents a sound vehicle for a reexamination of the circumstances in which pre-interrogation *Miranda* warnings must be given. We believe that an officer's act of providing information – whether through the display of evidence or through statements about that evidence – can give a suspect valuable insights about his situation without compelling him to do or say anything incriminating. Nothing in the Fifth Amendment or in the Due Process Clause of the Fourteenth Amendment bars officers from providing that kind of information before *Miranda* warnings are given and before actual questioning begins, and the ruling of the court below holding otherwise deserves review in this Court now.

II. Lower Courts Are Divided On The Question.

State and federal courts need direction on this issue, as do law enforcement officers in each of the amici States.

Several federal circuit courts have held that a statement by a police officer to a suspect or to others – or even the act of showing evidence to a suspect, as in this case – does not amount to the kind of "interrogation" that triggers the need for *Miranda* warnings (or does not amount to improper post-*Miranda* interrogation of a suspect who has requested counsel or has invoked his right to remain silent). See, e.g., *United States v. Payne*, 954 F.2d 199, 203 (4th Cir. 1992) (a law enforcement officer did not interrogate a suspect when the officer simply told the suspect that a gun had been found at his house), *cert. denied*, 503 U.S. 988 (1992); *Boykin v. Leapley*, 28 F.3d 788, 791-92 (8th Cir. 1994) (an officer did not interrogate a suspect when the officer said that the suspect's shoes had probably been sent off for examination by crime-scene investigators); *United States v. Blackstone*, 56 F.3d 1143, 1144, 1146 (9th Cir. 1995) (an officer's act of removing a suspect's gun from a bag and placing it on a desk in front of the suspect did not

constitute interrogation, so the suspect's statement "I was afraid you'd find that" was admissible despite the absence of *Miranda* warnings).

Several state courts have reached similar conclusions. See, e.g., *Lewis v. State*, 509 So.2d 1236, 1237 (Fla. App., 4th Dist. 1987) (showing a videotape of a robbery to the robbery suspect did not amount to interrogation), *review denied*, 519 So.2d 987 (Fla. 1987); *Carruthers v. State*, 528 S.E.2d 217, 224 (Ga. 2000) ("handing Carruthers a copy of the search warrant did not constitute interrogation"), *cert. denied*, 531 U.S. 934 (2000); *People v. Benjamin*, 300 N.W.2d 661, 666-67 (Mich. App. 1980) (an officer did not interrogate a suspect when he "removed the knives from defendant's purse and held them up" in front of her); *State v. Temple*, 273 S.E.2d 273, 278 (N.C. 1981) ("to present a person in custody with evidence recovered from the scene of the crime is not 'interrogation' within the meaning of the *Miranda* decision").

In contrast, several courts – like the court below – have treated as interrogation a police officer's act of showing evidence to a suspect in custody. See, e.g., *People v. Taylor*, 223 Cal. Rptr. 638, 639, 641 (Cal. App., 3rd Dist. 1986) (before an officer showed a bracelet and other items from a crime scene to a suspect, "*Miranda* warnings were required"); *Hawaii v. Uganiza*, 702 P.2d 1352, 1355 (Haw. 1985) (presenting to a suspect the written statements of several witnesses constituted interrogation of the suspect); *Maine v. Nixon*, 599 A.2d 66, 67 (Maine 1991) (after a suspect asked for a lawyer, a detective violated the Fifth Amendment by pushing a diagram toward the suspect and saying "You might find this interesting."); *People v. Ferro*, 472 N.E.2d 13, 14-15 (N.Y. 1984) (placing several stolen furs in front of a suspect in custody amounted to interrogation), *cert. denied*, 472 U.S. 1007 (1985).

The uncertainty generated by these differing approaches shows that guidance from this Court is needed now on this issue of recurring importance to the States.

CONCLUSION

For the foregoing reasons, the *amici* States urge the Court to grant the petition.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY*
State Solicitor
**Counsel of Record*

July 2002

No. 01-1774 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

STATE OF MARYLAND,

Petitioner

v.

DWAYNE ANTHONY DRURY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephen E. Harris
Public Defender of Maryland

Howard Mark Colvin*
Stacy W. McCormack
Assistant Public Defenders

Office of the Public Defender
Appellate Division
6 St. Paul Street, Suite 1302
Baltimore, Maryland 21202-1608
(410) 767-8519

*Counsel of Record

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SUMMARY OF ARGUMENT

Review is unwarranted because the opinion of the Court of Appeals of Maryland correctly applies this Court's decision in *Rhode Island v. Innis*, 446 U.S. 291 (1980). Resolution of this case requires nothing more than the application of settled law to a set of facts unique to this particular case. Moreover, contrary to Petitioner's claim, there is no conflict in the rulings of the federal and state courts as to the application of *Innis* in cases where a suspect in custody is shown or informed of evidence of a crime.

STATEMENT OF THE CASE

Mr. Drury was charged by indictment with the offenses of second degree burglary, fourth degree burglary, and theft of property over the value of $300. Prior to trial he moved to suppress statements that he made to the police.

The only witness to testify at the suppression hearing was Officer Mark Whaley of the Centreville police department. On July 14, 1996, Officer Whaley went to the Hillside Market in response to a burglary report. (Pet., App.2a, 45a). The owner of the market informed Officer Whaley that he had found a tire iron behind the counter near the cash register. (Pet., App. 45a-46a). Investigation revealed that the rear door had been pried open and that the tire iron may have been used to gain entry. (Pet., App.2a, 46a). Adult magazines, some of which were still wrapped in plastic, cartons of cigarettes, bottles of liquor, and scratch-off lottery tickets were missing. (Pet., App.2a-3a, 46a).

Later that night, a deputy sheriff told Officer Whaley that he had seen two individuals acting suspiciously near an alleyway at the corner of Commerce and Water Streets. (Pet., App.46a). At 3:00 a .m. on July 15, Officer Whaley went to that location, which was not far from the Hillside market, and looked through the trash. After opening one of the trash bags, he found several adult magazines, some of which had been opened and some of which still had the plastic wrap intact, and a liquor bottle. (Pet., App.46a-47a).

Officer Whaley next interviewed Karl Kirby, a suspect in the case. Kirby implicated Mr. Drury. (Pet., App.47a). Officer Whaley then went to Mr. Drury's home, "picked Mr. Drury up for questioning," and brought him to the police station. (Pet., App.3a, 47a-48a). Before advising Mr. Drury of his *Miranda* rights, Officer Whaley placed the tire iron and the trash bag containing the magazines on a desk in front of Mr. Drury and then told Mr. Drury that the items were going to be processed for fingerprints. (Pet., App.3a-4a, 47a, 49a). Mr. Drury responded by making incriminating statements about the tire iron and the magazines. (Pet., App.3a, 47a-49a). Officer Whaley then advised Mr. Drury of his *Miranda* rights. Mr. Drury made no further statements. (Pet., App.3a, 48a-49a).

On direct examination, Officer Whaley testified in relevant part as follows:

> Q. After you talked with Mr. Kirby, did you go visit Mr. Drury?
>
> A. Yes. I picked Mr. Drury up for questioning, at which time I proceeded to show Mr. Drury the evidence which was retrieved. In showing Mr. Drury the tire iron that was retrieved from the actual incident area, Mr. Drury said, well, my

fingerprints could be on that and are on hundreds of tire irons around Centreville, okay, and picking up the trash bag in which the magazines were located in, Mr. Drury proceeded to tell me the contents of the bag prior to me even stating what was in the bag myself.

Q. What did he tell you?

A. He said that he had touched the magazines that were in that bag.

Q. Both the opened and the unopened magazines?

A. Yes, sir.

Q. By unopened you mean, so we're all on the same wavelength, the girlie magazines with the plastic wrapper around them?

A. Yes, sir.

(Pet., App.47a-48a).

On cross-examination, Officer Whaley testified in relevant part as follows:

Q. Corporal Whaley, you said you questioned Mr. Drury on July 15th?

A. Mr. Drury wasn't actually questioned.

Q. What did you do with Mr. Drury? Did you speak to him?

A. I brought Mr. Drury in for questioning, and upon --

Q. Okay. Hold it. You took Mr. Drury and took him to the Centreville Police Department?

A. That's correct.

Q. Okay. So you didn't question him on the street or at the apartment?

A. No, sir.

Q. And you brought him into the Centreville Police Department and where did you talk to him then?

A. Within the department.

Q. Within the department. And did you Mirandize Mr. Drury?

A. Yes, I did.

Q. Okay. Did he give any statements after being Mirandized?

A. No, he did not.

Q. These statements you say that he made, what did you do before he made any statements? What actions did you take with this physical evidence?

A. I was presenting the evidence that was going to be used for the questioning.

Q. So you took the evidence out and put it in front of Mr. Drury?

A. I put it up on the desk in front of myself.

Q. We're talking about the tire iron you put in front of him?

A. Yes, sir.

Q. And the magazines in the bag, the physical evidence from this robbery?

A. Yes, sir.

Q. And did you tell Mr. Drury that you were going to send this evidence off for fingerprints?

A. As I recall, yes, sir.

Q. You told him all that before you Mirandized him?

A. Yes, sir.

Q. And that's when you claim that he made some statement about his fingerprints possibly being on these physical items?

A. Yes, sir.

Q. And then once he was Mirandized, he didn't want to talk to you?

A. No, sir.

(Pet., App.48a-49a).

Mr. Drury argued that Officer Whaley's conduct constituted interrogation within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966), because the officer should have known that his words and actions were likely to elicit an incriminating response. (App.50a-52a). The trial judge disagreed and denied the motion to suppress. (Pet., App. 51a-53a). A jury convicted Mr. Drury on all three counts. (Pet., App.5a).

On appeal, the Court of Appeals of Maryland found that Officer Whaley's words and conduct were the functional equivalent of interrogation within the meaning of *Rhode Island v. Innis*, 446 U.S. 291 (1980). (Pet., App.7a-8a). The Court of Appeals concluded that "the officer should have known, in light of his having told petitioner that he was being brought in for questioning, that putting the evidence before petitioner and telling him that the items were going to be fingerprinted was reasonably likely to evoke an incriminating response from him." (Pet., App.8a). Accordingly, the Court of Appeals held that Mr. Drury's statements should have been suppressed. (Pet., App.13a).

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW CORRECTLY APPLIES *RHODE ISLAND V. INNIS*, 446 U.S. 291 (1980).

In *Innis*, this Court addressed the meaning of "interrogation" under *Miranda*. The Court first reviewed the police practices that had evoked *Miranda's* concern about the coerciveness of the "interrogation environment." 446 U.S. at 299, quoting

Miranda, 384 U.S. at 457. Those practices included a variety of "psychological ploys, such as to 'posi[t]' 'the guilt of the subject,' to 'minimize the moral seriousness of the offense,' and 'to cast blame on the victim or on society.'" 446 U.S. at 299, quoting *Miranda*, 384 U.S. at 450. While none of these practices involves express questioning, the Court found that any of them, when coupled with the "'interrogation environment,'" is likely to "'subject the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." 446 U.S. at 299, quoting *Miranda*, 384 U.S. at 457-58. Accordingly, these "techniques of persuasion," in a custodial setting, "amount to interrogation." 446 U.S. at 299.

The Court concluded in *Innis* that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." 446 U.S. at 300-01. The Court explained the phrase "functional equivalent" of interrogation as including "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301 (footnotes omitted). While this definition "focuses primarily upon the perceptions of the suspect, rather than upon the intent of the police," *id.*,

> [t]his is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police

> practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

446 U.S. at 301 n.7. *See also Arizona v. Mauro*, 481 U.S. 520, 526-27 (1987).

Here, it is readily apparent that Mr. Drury was being "interrogated" within the meaning of *Innis* at the time of his incriminating statements to Officer Whaley. Although Officer Whaley had not engaged in any express questioning of Mr. Drury at the time those statements were made, Officer Whaley should have known that placing the tire iron and the trash bag containing the stolen magazines on the table in front of Mr. Drury and telling Mr. Drury that he was "going to send this evidence off for fingerprints" was reasonably likely to elicit an incriminating response. As the Court of Appeals observed, an incriminating statement was readily foreseeable:

> Petitioner had been brought to the police station for the express purpose of questioning and, in fact, had been told so by Corporal Whaley. The police were not engaged in routine booking procedures; they were not required by any Maryland rule or procedure to read any document (other than the *Miranda* rights) to petitioner. Nonetheless, the officer placed the tire iron and trash bag containing the stolen magazines on the table before petitioner before advising him of his *Miranda* rights. The officer told petitioner that he was going to send the evidence to be examined for fingerprints. Moreover, the officer testified that he "was presenting the evidence that was going to be used for questioning."
>
> It appears to us that the only reasonable conclusion that can be drawn from the foregoing facts is that the officer should have known, in light of his having told petitioner that he was being brought in for questioning, that putting the evidence before petitioner and telling him that the items were going to be fingerprinted was reasonably likely to evoke an incriminating response from him. The only plausible explanation for the

> office's conduct is that he expected to elicit a statement from petitioner.

(Pet., App.8a).

Petitioner suggests that "as a practical matter, the court below has created a per se rule that any time a police officer shows a suspect evidence of a crime the gears of *Miranda* are engaged." Pet.5.[1] The decision below creates no such rule. The Court of Appeals begins its opinion by stating that "[t]he question we must decide in this case is whether, *under the circumstances presented herein*, the statements that petitioner made prior to being advised of his *Miranda* rights must be suppressed because the officer conducted the functional equivalent of interrogation." Pet., App.1a-2a (emphasis added). The Court of Appeals concluded that Officer Whaley "should have known, in light of his having told Petitioner that he was being brought in for questioning, that putting the evidence before petitioner *and telling him that the items were going to be fingerprinted* was reasonably likely to evoke an incriminating response from him." Pet., App.8a (emphasis added). At no point in the opinion does the Court of Appeals even suggest that showing a suspect evidence of a crime is always the functional equivalent of interrogation. To the contrary, the Court of Appeals carefully noted that "whether police conduct was tantamount to interrogation depends on the facts and circumstances of the particular case" and that in this case Officer Whaley "did not merely place the tire iron and stolen magazines

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[1]Petitioner concedes that Mr. Drury was in custody for *Miranda* purposes when Officer Whaley brought him to the police station. Pet. 10 n.2

before him. The officer told Petitioner that they were going to process the items for fingerprints." Pet., App.10a-11a. Thus, the State's claim that the decision below creates "a per se rule" is simply untrue.[2]

Petitioner also accuses the Court of Appeals of "[f]ocusing on Corporal Whaley's subjective intent." Pet. 4. Again, this contention is belied by the record. The test applied by the Court of Appeals was not the officer's intent, but, rather, whether the officer should have known that his words and conduct were reasonably likely to elicit an incriminating response from Mr. Drury. Pet., App.6a, 7a, 10a, 11a, 13a. At two points in the opinion, while distinguishing this case on its facts from earlier Maryland decisions, the Court of Appeals observed that "[t]he only reasonable explanation for [Corporal Whaley's] conduct is that he intended to elicit a statement from petitioner" and that "Corporal Whaley's actions were aimed at

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[2]The Court of Appeals distinguished this case from *Vines v. State*, 285 Md. 369, 402 A.2d 900 (1979). Pet., App.10a-11a. Vines was arrested in his home during the execution of a search warrant and taken to the police station. There, Vines was advised of his *Miranda* rights, and he invoked his right to remain silent. He was then booked and taken to the roll call room, where, displayed on a table, were drugs that the police seized pursuant to the warrant. As required by the Maryland Rules of Procedure, Vines was given a copy of the warrant, including an inventory of the seized property, and he was told that "this is what was recovered from his house during the raid." Vines then admitted that "it was his stuff."

The Court of Appeals held that giving the inventory to Vines, in compliance with the Maryland rules, together with the simple factual statement linking the drugs to the inventory, was not tantamount to interrogation within the meaning of *Miranda*. 285 Md. at 377, 401 A.2d at 904-05; Pet., App.10a-11a. The fact that the Court of Appeals distinguished *Vines*, rather than overrule it, is further evidence that the Court of Appeals has not created a per se rule that *Miranda* warnings are required any time a police officer shows a suspect evidence of a crime.

invoking an incriminating remark." Pet., App. 12a-13a. In *Innis*, this Court noted that while the definition of interrogation focuses primarily upon the perceptions of the suspect, rather than the intent of the police, "[t]his is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to have that effect." 446 U.S. at 301, n.7. Thus, it was entirely proper for the Court of Appeals to consider Officer Whaley's intent in determining whether the officer should have known that his words and actions were reasonably likely to elicit an incriminating response.[3]

Mr. Drury had been brought to the police station for the express purpose of questioning, and he had been told so by Officer Whaley. Displaying the tire iron and the stolen magazines for Mr. Drury to see and telling him that the items would be processed for fingerprints was the functional equivalent of saying to him, "See for yourself the evidence we have against you. If your fingerprints are on them, you may as well tell me now. What do you have to say?" It is obvious, as the Court of Appeals concluded, that Corporal Whaley should have known that his words and actions were reasonably likely to elicit an incriminating response.

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[3]In *Innis*, this Court observed that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." 446 U.S. at 301 n.7. In its petition, the State does not dispute the Court of Appeals's conclusion that Corporal Whaley intended to elicit an incriminating statement from Mr. Drury. At no stage in this case has the State offered any other reason why Corporal Whaley would place the tire iron and stolen magazines in front of Mr. Drury and tell him that they were going to be sent off for fingerprinting.

II. THERE IS NO CONFLICT AMONG LOWER COURTS AS TO THE APPLICATION OF *INNIS*.

The State does its best to manufacture "a serious conflict" in the rulings of federal and state courts in cases where a suspect was either shown or informed of evidence of a crime. Pet.16-21. There is, however, no such conflict.

As the Fourth Circuit stated in *United States v. Payne*, 954 F.2d 199, 203 (4th Cir. 1992), "[t]he inquiry mandated by *Innis* into the perceptions of the suspect is necessarily contextual ... and whether descriptions of incriminating evidence constitute the functional equivalent of interrogation will depend on circumstances that are too numerous to catalogue." The fact that in some cases showing or informing a suspect of evidence of a crime has been deemed to constitute the functional equivalent of interrogation, and in other cases it has not, is not due to any conflict in the lower courts as to the meaning or application of the *Innis* standard. Rather, it is due to the fact that the factual circumstances of each case are different.

Moreover, in each of the cases cited by the State, "a suspect either was shown *or* was informed of evidence of a crime." Pet.16 (emphasis added). Here, as the Court of Appeals noted, Officer Whaley "did not merely place the tire iron and stolen magazines before [Mr. Drury]. The officer told petitioner that they were going to process the items for fingerprints." Pet., App.11a. In none of the cases cited by the State was the suspect told that he was being brought in for questioning and then confronted with evidence of a crime and told that the evidence would he processed for fingerprints. In short, there is no conflict in the rulings of federal and

state courts and no conflict between those rulings and the decision of the Court of Appeals of Maryland in this case.[4]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Stephen E. Harris
Public Defender

Howard Mark Colvin*
Stacy W. McCormack
Assistant Public Defenders

Counsel for Respondent

*Counsel of Record

June 27, 2002

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[4]The State also suggests that the "somewhat ambiguous language" in *Innis* concerning the relevance of the officer's intent has led to "some confusion" in the lower courts and cites three law review articles that offer their own interpretations of the *Innis* test. Pet.11-14. The State cites no case in which a court complains of any such ambiguity or confusion. In any event, under any of these interpretations, Corporal Whaley's placing the tire iron and stolen magazines in front of Mr. Drury and telling him that the items were going to be processed for fingerprints, after having told him that he was being brought in for questioning, is the functional equivalent of interrogation.

STATE OF MARYLAND,	*	IN THE
Petitioner	*	SUPREME COURT
v.	*	OF THE UNITED STATES
DWAYNE ANTHONY DRURY,	*	October Term, 2001
Respondent	*	No. 01-1774

* * * * * * * * * *

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CERTIFICATE OF SERVICE

I, Howard Mark Colvin, a member of the Bar of this Court, hereby certify that on the 27th day of June, 2002, three copies of the Motion for Leave to Proceed *In Forma Pauperis*, Affidavit in Support of Motion to Proceed *In Forma Pauperis*, and Brief in Opposition to Petition for Writ of Certiorari were served on counsel for Petitioner by depositing them in the United States mail, with first-class postage prepaid, to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 17th Floor, 200 Saint Paul Street, Baltimore, Maryland 21202. I further certify that all parties required to be served have been served.

Howard Mark Colvin